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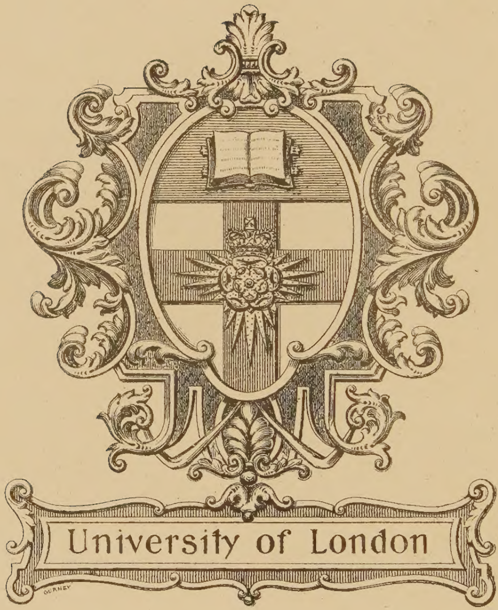

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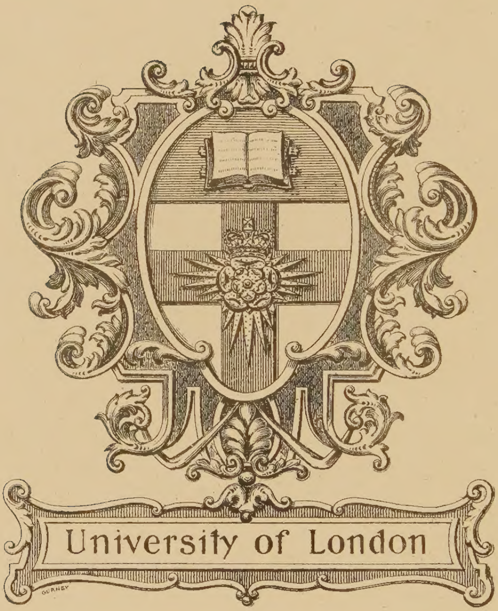
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THE
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LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS. THE PRIVY COUNCIL.
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1938
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CORRIGENDA.

P. 8. **RAWLINGS *v.* SMITH.** 2 lines above F. for "accused" read "accuser."

P. 69. UNIVERSITY COLLEGE, OXFORD *v.* SECRETARY OF STATE FOR AIR. The following passage in the Defence Act, 1842, s. 19, is also material to this case: ". . . and the jury . . . shall on their oaths . . . find the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof, as the case may be."

P. 74. **RADCLIFFE *v.* RIBBLE MOTOR SERVICES.** 3rd line below A for "her appeal" read "the appeal."

P. 361. A.-G. *v.* **ARTHUR RYAN AUTOMOBILES, LTD.** Headnote l. 7 for "defendants" read "plaintiffs."

P. 451. *Re* CONSETT IRON CO. Line above A. For SWIFT, J., read FINLAY, J.

P. 556. **PRATT *v.* COOK SON & CO. (ST. PAUL'S), LTD.** The only junior counsel for the plaintiff was *A. Melford Stevenson.*

P. 579. HALE *v.* JENNINGS BROS. Headnote. In the 5th line for "action" read "accident."

P. 668. *Re* COX, PUBLIC TRUSTEE *v.* EVE. Solicitors. For "Public Trustee" in each instance read Attorney-General.

P. 670. CONROY *v.* T. WILKINSON & SONS, LTD. 2 lines below H. For Mar. 31 read Mar. 13.

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

HERNIMAN *v.* SMITH.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, C Lord Maugham, Lord Roche), **October 18, 19, 21, 28, 29, November 1, 2, 4, 5, 8, December 22, 1937.]**

Malicious Prosecution—Reasonable and probable cause—Conviction quashed in Court of Criminal Appeal.

A timber-merchant from time to time supplied a builder with timber. D On several occasions deliveries of timber were made accompanied by fraudulent documents, which induced the builder to pay to the timber-merchant money to which the latter was not entitled. The builder preferred against the timber-merchant a charge of having unlawfully and knowingly conspired with one R. to cheat and defraud the builder. At the trial, the timber-merchant was found guilty, and sentenced to imprisonment. On appeal to the Court of Criminal Appeal, the conviction E was quashed. The timber-merchant thereupon brought an action against the builder for malicious prosecution. A jury found (i) that the builder had commenced and proceeded with the prosecution without any honest belief that the timber-merchant was guilty of fraud, (ii) that the builder had failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution, and (iii) that in commencing and proceeding with the F prosecution the builder was actuated by other motives than desire to bring to justice one whom he honestly believed to be guilty. Judgment was accordingly given for the timber-merchant. On appeal, the Court of Appeal reversed this decision, on the ground that there was reasonable and probable cause for prosecution, and that there was no evidence that could be left to the jury on any of the questions put to them. Thereupon the timber-merchant brought this appeal:—

G HELD: (i) in the circumstances, there was reasonable and probable cause for a prosecution.

(ii) whether the facts proved amount to reasonable and probable cause for the prosecution is a question for the judge, and not for the jury.

Per LORD ATKIN: It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His H duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution.

Order of Court of Appeal, [1936] 2 All E.R. 1377, *affirmed.*

[**EDITORIAL NOTE.** The House of Lords have here affirmed the decision of the Court of Appeal as to the existence of reasonable and probable cause, upon which the Court of Appeal had reversed the decision of the trial judge. The prosecutor was successful in his prosecution until the proceedings reached the Court of Criminal

Appeal, where the conviction was quashed. No particular stress is laid upon this in arriving at the decision that there was reasonable and probable cause, the judgments and opinions upon this point being based entirely upon a review of the facts. LORD ATKIN again states the principle that it is for the judge to say whether the facts amount to reasonable and probable cause, and he disagrees with HAWKINS, J., in *Hicks* v. *Faulkner* (1), where the latter says that the reasonableness of the accuser's belief in the existence of the facts on which he acted is a question for the jury. A

AS TO WANT OF REASONABLE AND PROBABLE CAUSE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 14-16, paras. 18-21; and FOR CASES, see DIGEST, Vol. 33, pp. 499-502, Nos. 398-431.]

Cases referred to:

(1) *Hicks* v. *Faulkner* (1881), 8 Q.B.D. 167; 33 Digest 467, *18*; 51 L.J.Q.B. 268; 46 L.T. 127; *affd.* (1882), 46 L.T. 130. B

(2) *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521; 33 Digest 503, *449*; 39 L.J.Ex. 177; 23 L.T. 269; *revsg.* S.C. (1868), L.R. 3 Exch. 197.

(3) *Abrath* v. *North Eastern Ry. Co.* (1883), 11 Q.B.D. 440; 33 Digest 500, *418*; 52 L.J.Q.B. 620; 49 L.T. 618; *affd.* (1886), 11 App. Cas. 247.

(4) *Bradshaw* v. *Waterlow & Sons, Ltd.*, [1915] 3 K.B. 527; 33 Digest 506, *493*; 85 L.J.K.B. 318; 113 L.T. 1101. C

APPEAL from an order of the Court of Appeal (GREER, GREENE and SCOTT, L.JJ.), dated July 13, 1936, and reported in [1936] 2 All E.R. 1377, setting aside the judgment entered for the appellant by TALBOT, J., on Feb. 6, 1936, and entering judgment in favour of the respondent. The facts and the arguments are set out in the opinion of LORD ATKIN. D

A. S. Comyns Carr, K.C., S. Parnell Kerr and *W. Russell Lawrence* for the appellant.

Serjeant A. M. Sullivan, K.C., and *H. V. Lloyd Jones* for the respondent.

LORD ATKIN: My Lords, this is an appeal from an order of the Court E of Appeal setting aside a verdict and judgment for the plaintiff in an action for malicious prosecution tried before TALBOT, J., and a common jury, and entering judgment for the defendant. The judge had left to the jury the following questions: (1) Has it been proved that the defendant commenced and proceeded with the prosecution without F any honest belief that the plaintiff was guilty of fraud? (2) Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution? (3) Has it been proved that the defendant, in commencing or proceeding with the prosecution, was actuated by other G motives than a desire to bring to justice one whom he honestly believed to be guilty?

The jury answered all three questions in the affirmative. The judge thereupon held that there was an absence of reasonable and probable cause, and, as the third answer amounted to a finding of malice, left H the question of damages to the jury. They assessed the damages at £6,500. In the statement of claim, however, only £5,000 was claimed. The judge refused leave to amend, and entered judgment for the plaintiff for £5,000.

The defendant appealed and the plaintiff gave notice of cross-appeal against the order refusing leave to amend. On the latter point at an early stage your Lordships intimated to counsel for the appellant that they were not disposed to interfere in a matter which, in the circumstances, depended so much on the discretion of the judge, and the question was not further pressed.

A On the main question, it is material to state that the plaintiff, together with one Rickard, was charged with conspiracy to defraud Harold C. Smith, the defendant, and with obtaining money from him by false pretences on four different occasions. They were charged before the justices at Edmonton on the information of Mr. Smith, committed for B trial to the Central Criminal Court, tried there before the present recorder, and convicted and sentenced each to 12 months' imprisonment. On appeal to the Court of Criminal Appeal, the court set aside the conviction, being of opinion, in the case of Herniman, that there was not a sufficient case to go to a jury, and that, in all the circum- C stances, it would be safer that the conviction against Rickard should be quashed as well. In these circumstances, it was not disputed, and, in my opinion, could not be disputed, that the proceedings had terminated in favour of the present plaintiff, so as to satisfy that essential element in an action for malicious prosecution.

D The Court of Appeal held that there was no evidence which would justify the judge in leaving the first two questions to the jury, and, being of opinion that there was no absence of reasonable and probable cause, allowed the defendant's appeal. It will be necessary, therefore, to examine the facts ascertained by the defendant at the time when he E laid the information and subsequently proceeded with the prosecution. I need state only that the inquiry is confined to the effect, or to the reasonable effect, of the evidence from time to time on Mr. Smith's mind, and that no question any longer remains as to the plaintiff's innocence, which must be conclusively presumed.

F The plaintiff Herniman carried on business in London as a timber-merchant, and, at the date of the criminal proceedings, was about 62 years of age. He had served in the Royal Horse Artillery since 1894. At the date of the outbreak of the War he had been Battery Sergeant-Major. He was granted a commission in Dec., 1914, and retired in G Nov., 1919, with the rank of Captain. He went into the timber trade, and, after one or two unsuccessful ventures, started his present business in 1930. He opened a small office in Chandos Street, Buckingham Gate, in 1933. His business began to prosper, and, from about the last-mentioned date, one of his customers was the defendant Smith, H who was a builder engaged at material times in developing building estates at Edmonton, Loughton, Eastcote, and other places. There is no evidence that Smith knew anything about Herniman's career other than that he was Captain Herniman. The course of business between the parties is not made entirely clear by the evidence, but the general outlines are obvious enough. Herniman's office and staff were limited to one room and a clerk, Copland. Herniman himself went about and got orders.

Either he would get notice of available parcels offered to him by the large merchants, whom it will be convenient to call the importers, and pass on the details in an offer to his customers, or he would get an order from a customer and then buy from the importer to complete it. Sometimes, of course, he would have to go to more than one importer to get the requisite sizes, and it would happen that, whether he bought and then sold, or sold and then bought, it would be convenient at times to buy parcels which did not correspond to any then-existing order. The stock so acquired was never large, and Herniman in fact kept no stock-book. When there was any spare stock of which he took delivery, he was able to store it in the yard of Rickard, his co-defendant in the criminal proceedings. He had no storage accommodation of his own. Rickard was a carrier. He owned about 10 lorries, and had his yard at Bermondsey. He appears to have carried for Herniman all the timber that was sold to Smith, and his terms were £1 per standard of timber. Most of the timber was sold per standard, which is a cubic measure, at about £14 per standard. Some of the timber matchboarding was sold by the square, which is a superficial measure. Twenty squares, for purposes of calculating freight, equalled one standard. There is some uncertainty as to the practice of Herniman and Smith, respectively, concerning the recording of contracts. Smith at one time had an order-book, but apparently none of the relevant orders was to be found recorded in it. They were given verbally by King, Smith's manager, to Herniman, so it was said. Herniman kept no order-book. He wrote down the orders as received in a notebook, which was not kept after it had served its purpose. One is left with the conclusion, which is accurate enough generally, that the goods placed on a lorry would correspond with a specific order, generally in complete fulfilment of the order, or at any rate in part. When Herniman desired to fulfil an order, he would receive from his importer a delivery order entitling him to receive from dock or warehouse the agreed quantity of timber. He would hand this to his carrier, Rickard, with instructions to get delivery of the goods and carry them to Smith. He would also provide Rickard with blank delivery notes, with printed headings bearing Herniman's name, addressed to Smith: "Please receive from (Herniman)." The delivery notes bore two printed notices:

> Note.—This note must in no case be signed for more pieces than are actually received, or no claim can be allowed in case of deficiency.
>
> Rejections not entertained unless made at time of delivery.

It was the duty of the lorry-driver to fill up the details from the document he received at the dock, the dock pass, specifying the timber loaded. The delivery note was prepared in duplicate. It would be signed by the checker in the employ of Smith on the building site, and one copy would be left with Smith's representative, while the other was retained by

Rickard's lorry-driver. The dock pass was prepared by the dock authorities. It would correspond with the delivery order, and served as receipt to the dock authorities, and a pass-out for the goods from the dock premises. When delivery was completed, the dock pass and Herniman's delivery note, signed by Smith's checker, would be handed by the driver to Rickard, who pinned them together and sent them to Herniman's office. Herniman's clerk would prepare an invoice from the receipted delivery note, and in about 10 days' time Herniman would draw on Smith a three-months' bill for the invoice amount. Business was done between the parties on these lines in the years 1933, 1934, and 1935, to a considerable extent. The turnover in that period was to an amount of about £26,000.

The first intimation received by Smith of any dishonesty was contained in a letter addressed to him by one Edger, dated Nov. 14, which stated that he had been in the employ of the Stirling Haulage Co. [Rickard], carters for Herniman:

> and during my 16 months' service of timber carting to Edmonton, Loughton, Enfield and Eastcote your delivery tickets have been faked to the extent of 34 standards.

It went on to state that this was only one of four lorries doing the same, and that, if Smith cared to see him, he could furnish dates and quantities. Smith had an interview with Edger, who told him that, shortly after starting to work for Rickard, he was told by Rickard to put extra timber, over and above that delivered to the customer, on the bill. This would be done by increasing the foot run, calling 14 ft. lengths 16 ft., and so on in proportion, and also by increasing the number of pieces in the various lengths. He produced a list of total increases showing on certain dates extra amounts varying from ½ to 2¼ standards in the day. The list gave no details. Smith put the matter in the hands of the police, who from this time on were engaged in investigating the alleged fraud.

The police obtained from the dock authorities copies of the dock passes, and, when these were compared with Herniman's delivery notes, it became evident that, in several cases at least, Edger's statement that he had "faked" the delivery notes was true. An instance will suffice. On May 15, 1934, there is a delivery note from Herniman relating to 665 pieces T.G.V. and 905 pieces F.E. The corresponding figures in the dock passes of the same date are altered, as appears in the table below:

Dock Pass. 4^t T.G.V. ½×4½		Delivery Note. ⅝×4½ T.G.V.	
No. of pieces.	Length in feet		
6	20	6	22
33	19		
23	18	56	21
31	17		
77	16	108	20
52	15		
37	14	89	19
58	13		
48	12	106	18
37	11	37	17

The brackets are inserted in order to call attention to the identity of the numbers. In relation to the same delivery note, the 705 pieces F.E. in the dock pass have been altered in the delivery note thus:

Dock Pass.		Delivery Note.		
Dimensions ¾ × ¼ × 4½		¾ × ¼ × 5		
14 }	20			
4 }	19	18	22	A
12 }	18			
36 }	17	48	21	
13 }	16			
112 }	14	125	20	

Similar alterations have been made, and 705 pieces have become 905. Part of the consignment it is difficult to identify, and it is probable that B the order was completed from stock in Rickard's yard, the dock goods not required having been unloaded there. The figures as to dimensions appear in the delivery note in both cases to be in Rickard's handwriting; the rest of the document is in Edger's writing.

The delivery note was signed by one of Smith's servants, but there C was evidence that, with large deliveries, in the stress of business it was in practice impossible accurately to check the number and dimensions of the pieces, and that the checker often gave up the task and signed as a matter of form. The invoice corresponded with the delivery note, and, therefore, it is plain that payment was demanded by Herniman D for the increased quantity, and that it was received by him. The excess in this case is stated to be the equivalent of over 20 squares, which, at 10*s.* and 8*s.* a square, which was the price in this case, would amount to £8 to £10. The average price of the timber sold by the standard was about £14 per standard. E

After Smith's first interview with Edger, before the police had obtained copies of the dock passes, Smith complained to Herniman about deliveries which had been made to a building site at Eastcote, and there was some correspondence about it. Apparently Smith was under the impression that a large amount of timber, about 14 standards of 2 × 4, had not F been delivered. It was in fact found to be on the site, where it had been overlooked. Evidence was given by Herniman at the trial that this appeared to satisfy Smith, and, as Smith gave no evidence at the trial, the jury were entitled to believe this. Smith, however, used the occasion to ask for the dock-delivery tickets, on which to check deliveries, G and he was told that they were not kept after goods had been invoiced, by reason of restricted office space. On Dec. 21, when copies of the dock-delivery tickets had been obtained by the police, Edger made a further statement, confirming his former allegations and pointing out instances of how the alterations were made, as in the instance I have just given. H On Jan. 20 another lorry-driver, Dean, made a statement similar to Edger's, to the effect that, since Sept., 1933, Rickard had shown him how to make out delivery notes increasing size and length and number of pieces, and had told him to do what he could, and that during that period he had continued to fake the delivery notes. When called before the magistrates, Dean deposed that the above statement was all wrong. He was not in fact called at the Central Criminal Court. On Jan. 25, Smith swore an information against Herniman and Rickard that they had conspired together to cheat and defraud Smith in the supply and delivery of timber, and in pursuance of such conspiracy and by false pretences and with intent to cheat and defraud had obtained from him between May, 1934, and Aug. 31, 1934, the sum of £34. On this information, which was apparently drafted by the police, a justice of the peace issued a warrant for the arrest of Herniman and Rickard under which both men were arrested at their respective offices and asked to produce their books, of which the police took possession. In my opinion, an information in the general terms used in this case should not have been accepted by the justice as sufficient to justify a warrant, and in any case it seems a remarkable exercise of discretion to authorise the arrest of men who had been carrying on a substantial business at ascertained addresses for a number of years, and against whose character nothing was known. However, Smith could not be made responsible for the exercise of a judicial discretion.

At the hearing before the justices, evidence was given at various dates of four instances in which delivery notes had been faked, and of payment on the invoices based upon them. The prosecution was conducted by a solicitor on behalf of Smith. The two defendants, after unsuccessfully submitting to the justices that there was no case, reserved their defence, and were committed for trial to the Central Criminal Court. They were tried before the present recorder on an indictment which, in the first count, charged them with conspiracy to defraud Smith between Apr. 1, 1932, and Nov. 30, 1934, by false representation as to the quantities and description of timber supplied, and, in four other counts, charged them with obtaining a definite sum of money by falsely pretending that they had delivered more timber than was in fact delivered. The second count was based on the documents which I have already discussed. The defendants gave evidence, and explained the difference between the dock passes and the delivery notes by stating that the dock passes represented only Herniman's purchases, and that to fulfil Smith's contracts the lorries would be taken to Rickard's yard and the contract quantities and lengths substituted, where necessary, in place of the dock quantities. They both repudiated Edger's story of having received instructions to fake the dock passes, and relied on admissions made by Edger that in some cases he had removed timber from the lorries and sold it. They accounted for his alterations by asserting that they were part of his method to conceal his own thefts. Both defendants were convicted, and were sentenced to 12 months' imprisonment. On appeal, as has been already stated, the convictions were quashed by the Court of Criminal Appeal. It should be stated that the plaintiff stated in evidence that in Sept., 1934, Smith had asked for a loan of £500, which had been refused. On Nov. 24, Smith refused payment of a bill for £200, dated Aug. 21, and drawn at three months. It will be noticed that this was 10 days after the first letter from Edger, dated Nov. 14. Thereafter he refused payment of all Herniman's bills, and between Dec. 6, 1934, and Jan. 24, 1935, Herniman issued five specially indorsed writs against him for the amount of the bills, in all about £1,325. The affidavits in answer all alleged fraud. Certainly some of them did not state the fraud as sought to be proved in the criminal proceedings. For instance, in one affidavit, dated Jan. 2, 1935, Smith swore that the plaintiff by his agent:

> represented that certain goods would be delivered upon the terms agreed and in consideration thereof the defendant gave the plaintiff the bills of exchange sued on.

It was suggested that this represented, contrary to the fact, that the bill was accepted before the goods were delivered. This was used as evidence that the plaintiff did not honestly believe the case upon which he founded the prosecution. In view of the fact that the police at this time were actively pursuing inquiries, following out Edger's story, the evidence said to be afforded by the affidavits seems of little value. There are several explanations of inaccuracy in such affidavits consistent with complete belief in the eventual story.

Upon this state of facts, was there evidence of the want of reasonable and probable cause for the prosecution? I know of no better statement of the issue than that in the words of Hawkins, J., in *Hicks* v. *Faulkner* (1), at p. 171:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

I think "the position of the accused" means "the position of the defendant." It is well-settled that the question of the absence of reasonable and probable cause is for the judge. At the same time, it is, I think, clear that the question is one of fact, and not of law: see *Lister* v. *Perryman* (2), per Lord Chelmsford, at p. 535, and per Lord Westbury, p. 538. It is this circumstance of the decision of a material question of fact being confided to the judge that has given rise to disputes in a trial by jury as to what is the function of the jury. There is a danger lest the questions asked in this case, which are taken from the questions formulated by Cave, J., in 1882, in the well-known case of *Abrath* v. *North Eastern Ry. Co.* (3), should be asked in every case. This, it seems to me, would be to take the decision of the issue out of the hands of the judge, to whom, in the interests of prosecutor and accused alike, it has been confided. The jury no doubt have important functions to perform. They are to find for the judge what the relevant facts are, when they are disputed. If there is any evidence of a lack of honest belief in the guilt of the accused on the part of the prosecutor, the fact whether he honestly believed or not is a disputed but essential fact, on which the judge is to

draw his conclusion, and is a question for the jury. Questions may arise as to what are the true facts upon which the prosecutor acted. Were the statements which he says were made to him in fact made? Were the documents which he says he saw in fact seen by him, and in the form in which he says he saw them? If the evidence on which
A he acted for any cause reasonably apparent to him might be unreliable or incomplete, was he aware, or should he, in the circumstances of the particular case, have been aware, that there was other reliable evidence available? If there are specific points of genuine dispute between the parties in regard to such circumstances, the facts should be ascertained
B by the jury. But to ask the general question whether the defendant took reasonable care to inform himself of the true state of the facts appears to me in many cases merely to ask the jury what the judge has to decide for himself. The facts upon which the prosecutor acted should be ascertained. In principle, other facts upon which he did not
C act appear to be irrelevant. When the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused. I cannot think that HAWKINS, J., is right in *Hicks* v. *Faulkner* (1), at p. 172, when he says that the reasonableness of the accuser's belief in the exist-
D ence of the facts on which he acted is a question of fact for the jury. It seems to me that that question, together with the question whether the facts so believed amount to reasonable cause for believing the accused to be guilty, are for the judge. I do not think that much assistance is to be found in the numerous decisions upon this class of case.
E They most of them deal with the question of fact as to what was reasonable and probable cause in the particular case, a question of fact over which the appeal tribunal has the same control as the trial judge. As decisions of fact, they constitute no authority, except in precisely similar circumstances, and they should be treated accordingly. I do find, how-
F ever, in the decision in *Bradshaw* v. *Waterlow & Sons, Ltd.* (4), statements of the law with which I agree, and which appear to support the view I have above expressed.

Now, applying these principles to the particular case, was there any evidence of the want of reasonable and probable cause? Smith had
G the evidence of Edger. He was admittedly dishonest, and, if Smith had acted on his evidence alone, no doubt the plaintiff could have established his case. But Smith determined to test his story by reference to the dock passes. He tried to get copies from Herniman, and failed, and then procured these through the police. When seen, some of these
H undoubtedly proved the truth of Edger's story as to the delivery notes being faked. That Smith had been defrauded in these cases was beyond question. That Rickard was a party to the fraudulent alteration appeared probable, for the incorrect general dimensions in the delivery note were in Rickard's handwriting. At the time when the information was laid, Smith had Dean's statement that he had done exactly the same thing

as Edger, and at Rickard's instigation. It is true, and it is a very relevant consideration, naturally much pressed by counsel for the appellant, that neither Edger nor Dean professed to implicate Herniman. But the effect of the evidence is that Herniman's delivery notes were fraudulently prepared by the persons whom he authorised to fill them up, that Herniman delivered invoices based on the fraudulent quantities, and that he obtained on those invoices sums of money which were not due. The effect is that, where the fraudulent excess amounts to a standard, £14 goes into Herniman's pocket, and the carrier's sole advantage, if Herniman was innocent, would be the extra £1 for carrying the fictitious extra standard. In these circumstances, on the facts ascertained by Smith, I think that they would induce a conviction, founded on reasonable grounds, of a state of circumstances which would reasonably lead any ordinarily prudent and cautious man placed in Smith's position to the conclusion that Herniman was probably guilty of the crime imputed. It is said that inquiries as to the course of business would have shown that the orders were not necessarily executed by delivery direct from the docks, but that sorting to order took place at Rickard's yard. The answer is that, in the kind of case of which instances were given above, the change from dock to yard did not take place, and could not have taken place. It was further said that it might have been foreseen that Edger made this alteration to enable him to conceal his own depredations at the yard. It does not seem to me that this explanation is sufficient. It is very difficult to see how it could have happened without Rickard's complicity, or, on the inference from motive, therefore, without Herniman's complicity, and I can see no reason at all why Smith should have thought of it. It is true that Edger admitted certain thefts when cross-examined before the justices, but it is also true that the justices nevertheless thought, after a submission to the contrary, that there was a *prima facie* case, and that neither of the defendants gave evidence before the justices. I cannot see that Smith's position was any the worse after the depositions had been taken, nor that there was any reason to suppose that he should have been less inclined to believe in the case than the justices were. It was further said that he should have asked for a further explanation from Herniman. No doubt circumstances may exist in which it is right, before charging a man with misconduct, to ask him for an explanation. But certainly there can be no general rule laid down, and, where a man is satisfied, or has apparently sufficient evidence, that in fact he has been cheated, there is no obligation to call on the cheat and ask for an explanation, which may only have the effect of causing material evidence to disappear, or to be manufactured. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but to ascertain whether there is reasonable and probable cause for a prosecution. In this case, it must further be remembered, as was pointed out by junior counsel for the respondent, that during the whole time litigation was pending between Smith and Herniman, in which the parties were necessarily at arm's length, and in which the issue of fraud was clearly raised and resisted in the affidavits on either side.

On the whole of the facts, therefore, which, in deference to the forcible A argument of appellant's counsel, and in view of the importance of the case to the appellant, I have discussed at some length, I come to the same conclusion as that of the Court of Appeal, that there was no evidence on which the judge could leave any question to the jury, and that he should have decided that there was no want of reasonable and B probable cause. Neither of the first two questions should have been left to the jury. There was no evidence to go to the jury in support of the affirmative of either of them. Whether, independently of the want of reasonable and probable cause, there was any evidence of malice is a question which, in the circumstances, becomes irrelevant. I think C that this appeal should be dismissed.

LORD RUSSELL OF KILLOWEN: My Lords, I have had an opportunity of reading and considering the opinion which has just been delivered by my noble and learned friend LORD ATKIN. I agree with it, and have nothing to add.

D

LORD ATKIN: My Lords, I am authorised by my noble and learned friends, LORD MACMILLAN, LORD MAUGHAM and LORD ROCHE to state that they also agree with the opinion which I have just delivered.

Appeal dismissed.

E Solicitors: *Crofts & Ingram and Wyatt & Co.* (for the appellant); *W. R. Nash* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

F

RAWLINGS *v.* SMITH.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Porter, JJ.), **December 14, 1937.**]

Criminal Law—Loitering with intent to commit a felony—Several acts on the same date—Whether a "suspected person"—Vagrancy Act, 1824 (c. 83), *s.* 4.

G

The respondent was charged under the Vagrancy Act, 1824, s. 4, with being a suspected person loitering in certain streets on Feb. 27, 1937, with intent to commit a felony. It was proved that, on that date, at various times of the day and in different places, the respondent was looking into, and trying to open the doors of, unattended motor cars H standing in the street. The magistrate found that the respondent was loitering in a public place on that day, and that he intended to commit a felony, but he held that the respondent was not a suspected person, on the ground of the shortness of the interval of time between his earlier actions relied on to make him a suspected person and his later actions showing that he was loitering with intent to commit a felony:—

HELD: (i) it was not necessary for the respondent to have become a suspected person on a day earlier than the day of the loitering.

(ii) as the suspicion which made the respondent a suspected person was suspicion arising from acts antecedent to the act occasioning the arrest, the two separate elements in the charge were clearly proved.

[**EDITORIAL NOTE.** In the present case it was argued that the decision in *Ledwith* v. *Roberts* (1) had overruled the decision in *Hartley* v. *Ellnor* (2), with the result that the acts creating the suspicion and making a person a "suspected person" must take place on a day antecedent to the date on which the person is charged with loitering with intent to commit a felony. This is held not to be so, and it is said that there is nothing in the judgments in *Ledwith* v. *Roberts* (1) which overrules *Hartley* v. *Ellnor* (2).

AS TO SUSPECTED PERSON, see HALSBURY, Hailsham Edn., Vol. 25, pp. 442, 443, para. 790; and FOR CASES, see DIGEST, Vol. 37, pp. 363-365, Nos. 1651-1662.]

Cases referred to:

(1) *Ledwith* v. *Roberts*, [1937] 1 K.B. 232; [1936] 3 All E.R. 570; Digest Supp.; 106 L.J.K.B. 20; 155 L.T. 602.

(2) *Hartley* v. *Ellnor* (1917), 86 L.J.K.B. 938; 37 Digest 364, *1659*; 117 L.T. 304.

APPEAL by way of case stated from a decision of the chief magistrate of the police court of the metropolis. The facts are set out in the judgment of LORD HEWART, L.C.J.

L. A. Byrne and *E. J. P. Cussen* for the appellant.

Frank Milton for the respondent.

LORD HEWART, L.C.J.: An information was preferred by the appellant, a detective constable of the Metropolitan Police, against the present respondent, charging him under the Vagrancy Act, 1824, s. 4, with being a suspected person loitering in certain streets on Feb. 27, 1937, with intent to commit a felony. On Apr. 6, the magistrate, having heard the evidence, dismissed the information, subject to this case stated. It was established to the satisfaction of the magistrate that, on Feb. 27, 1937, at various times of the day, and in different places, the respondent was looking into, and trying to open the doors of, unattended motor cars standing in the street. That course of conduct was observed again and again in the course of the evening. Particular mention is made of certain instances occurring at 9.45 p.m. in that evening, at 10.50 p.m. in that evening, and afterwards at 11.5 p.m. in that evening. The respondent, on his part, denied that he had looked into any car, or tried the door or opened the door of any car. The magistrate, having listened to the evidence and the arguments, found two facts: he found that the respondent was loitering in a public place on the day named, and that he did intend to commit a felony, but, for reasons which he has set out in a very clear judgment, he was of the opinion that he could not treat the respondent as being in the class of suspected persons. It is quite obvious, when one reads the facts of this case and the judgment of the magistrate, that he would have come to the contrary conclusion had he not formed the opinion that a recent judgment in the Court of Appeal, *Ledwith* v. *Roberts* (1), had got rid of the judgment of this court in the case of *Hartley* v. *Ellnor* (2). He expresses his opinion in this way :

> The conviction in this case [there had been a previous conviction] proved before me was between 4 and 5 years ago. I refused to listen to his record antecedent to that conviction on the ground that it was merely hearsay. In my opinion there is not sufficient reason to justify my holding that the accused at the time of his arrest A was by virtue of that conviction a suspected person. It seems obvious that a man who becomes a suspected person by reason of conviction for dishonesty cannot remain for ever in the category of suspected persons merely by virtue of that one conviction or what may have gone before it. Where there is no evidence that he has not lived honestly for a considerable period I think he must be regarded as having ceased to belong to the category of suspected persons. Four or five years seems to me an ample period from which to infer this change in his status, and I B hold that the defendant is not a suspected person by reason of his previous conviction proved before me.

So far as that part of the judgment is concerned, no one is contesting it, but the crux comes in the second part of the judgment, which is as follows :

> C The second way in which it may be argued that he was at the time of his arrest a suspected person is upon the evidence as to his earlier conduct in tampering with cars on the same day.

I pause to say that the facts found in the case make it clear that that tampering on that same day was carried on over a considerable period D of time, and related to a somewhat protracted series of acts. The magistrate continues :

> Without attempting to lay down any rule whether a course of conduct on the same day would not suffice to bring a man against whom nothing else was known within the category of suspected persons, I hold that where the time between the two sets of actions relied upon (that is, earlier actions making him a suspected person and then later used to show that he is loitering with intent) is as short as E in the present instance, it is not reasonable to classify the accused as a suspected person on one piece of his conduct and treat the other part of his conduct as evidence of his illegal operations. It is a question of degree in each case, but where the time is very short it seems to me we get very close to the state of affairs in *Hartley* v. *Ellnor* (2), a case which, since *Ledwith* v. *Roberts* (1), can no longer be considered as good law.

F In my opinion, the magistrate, in holding that the decision in *Hartley* v. *Ellnor* (2), rightly understood, has ceased to be good law by reason of the decision in *Ledwith* v. *Roberts* (1), rightly understood, made an error in point of law. What is the point of the earlier case, *Hartley* v. *Ellnor* (2) ? It came before this court on a case stated by justices at Birmingham, G and, in order to see precisely the point which was raised, it may be well to reiterate the terms of the section which was being considered. The Vagrancy Act, 1824, s. 4, provides, leaving out immaterial words, that every suspected person or reputed thief frequenting any street or any place of public resort with intent to commit a felony shall be deemed H a rogue and vagabond. The evidence in the case is summarised, and the report at length is accurately summarised in the headnote as follows at p. 304 :

> Ellnor was kept under observation by the police in a certain part of the city of Birmingham on a certain day for a period of about 40 minutes. During that time he was seen to mix with various crowds of people who were in the act of boarding tramcars, and he was noticed to tap the pockets of various individuals in the crowds.

> He was then arrested by the police as a suspected person and charged before the justices of Birmingham with being a rogue and vagabond within the meaning of the Vagrancy Act, 1824. There was no evidence of any previous offence against E.

The justices in those circumstances dismissed the information subject to a case stated. The judgment of this court was delivered by Avory, J., who said, at p. 939 :

> The justices dismissed the charge on the ground that, in the absence of any evidence before them showing that the respondent had been previously convicted or that he was a person of previous bad character, they were not entitled to find that he was a suspected person within the meaning of the section under which the charge was made against him. It was upon the narrow point that I have mentioned that the justices dismissed the charge, and [these words, I think, are very important] the only question which we are called upon to decide is whether they were right in coming to the conclusion that there must be evidence of a previous conviction or of previous bad character in order to render an individual a suspected person within the meaning of the section of the statute under which these proceedings were taken . . . the justices considered the phrases " suspected person " and " reputed thief " to be synonymous, but it is quite clear to us that these words have not the same meaning. A person may be a suspected person even though he is not a reputed thief, and a person may be a suspected person on a particular day, even though he has not been previously convicted, or even though he has not had a reputation for bad character in the past . . . It was never suggested that the respondent was a person from whose known character an inference might be drawn that he was in a certain place with the intention of committing a felony. Reliance was placed, however, upon the evidence of the particular acts done by him on the day in question from which the court might be asked to infer that he was in the particular place with the intention of committing a felony . . . The present proceedings, however, were taken under the Vagrancy Act, 1824, and this statute does not require proof that the person who is charged as a suspected person is a person of ill fame and a reputed thief unless, as counsel for the respondent has contended, the mere use of the words " suspected person or reputed thief " imply that before he can be convicted of the offence there must be evidence that, prior to the day in question, he had the reputation of being a thief, or had been suspected before that day, when he could be properly described as a suspected person. By whom must he have been suspected before the day in question ? Would the suspicion of one individual before the day in question be sufficient to show that he was a suspected person ? We have not been enlightened upon these points ; but we are clearly of opinion that in the present case there was ample evidence before the justices to show that the respondent was in fact a suspected person, and also that there was ample evidence to render it possible for the inference to be properly drawn that the respondent was frequenting Martineau Street on the day in question with the intention of committing a felony.

That decision, it seems to me, involves at least two things. It asserts, and nobody contests the view, that, in order to come within the range of this section of the Vagrancy Act, a person must be a person who falls into a certain category or class. Here he falls into the class, not of reputed thieves, but of suspected persons, and the decision of this court in *Hartley* v. *Ellnor* (2) clearly so held. The defendant, who is to be held liable under sect. 4 of the Act of 1824, must be shown to be a person who belongs to the class of suspected persons, but—and this is the second point—it is not necessary that he should have acquired the status, or have fallen into the category, of suspected persons upon some day earlier than the day which is charged in the information. It is enough if acts antecedent to the act in question occasioning the arrest were of such a kind as to provoke suspicion. In that case, *Hartley* v. *Ellnor* (2), the individual acts relied upon had extended over a period of something like 40 minutes, and the climax of those acts was that the defendant was arrested as a suspected person loitering with intent to commit a felony.

It was not that the one and the same act gave rise (*a*) to the suspicion and (*b*) to the arrest. The suspicion which made the defendant a suspected person was suspicion arising from acts antecedent to the act occasioning the arrest. That seems to me to be the effect of the decision in *Hartley* v. *Ellnor* (2), and it gets rid of the notion or the proposition that, in order to be a suspected person who can loiter within the meaning of that section, the man must have got into the class of suspected persons on a day earlier than the day of the loitering. The magistrate was evidently persuaded that the judgments, or some of the judgments, in the Court of Appeal in the case of *Ledwith* v. *Roberts* (1) had superseded or differed from the judgment of this court in *Hartley* v. *Ellnor* (2). I do not so read the judgments. It is very necessary, in looking at the judgments in that case, as in all cases, to have regard to the facts which were then being considered, and the essential point of the facts in the case from Liverpool which was being considered in *Ledwith* v. *Roberts* (1) was that the one and the same act had been relied upon by the prosecution both as giving rise to the suspicion which was to bring the defendants into the class of being suspected persons, and as being the act which occasioned the arrest. There was one transaction, and one transaction only. There was nothing in that case antecedent to the act which culminated in the arrest giving rise to suspicion against the particular persons concerned, and stress is laid upon the point that that which gives rise to the suspicion must be anterior to that which occasions the arrest. GREER, L.J., says, at p. 245:

> They can only be apprehended without warrant if they already are at the time of their arrest and imprisonment suspected persons or reputed thieves. I do not think this means that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant.

In other words, there must be the necessary ingredient of antecedent facts giving rise to suspicion which brings the offender, or the alleged offender, into the category of suspected persons. He may not be put into the category of suspected persons solely by the act which causes him, upon arrest, to be charged with loitering as a suspected person with intent to commit a felony.

Our attention has been directed to other passages in the other judgments in that case. With all due respect, I do not think that any passages in those judgments, when they are read in relation to the material which was then before the court, in any degree impair the effect of the judgment in *Hartley* v. *Ellnor* (2) on the subject-matter with which that judgment was dealing. To go back to the difficulty which was formulated before the magistrate in this case, and which was accepted by him as insurmountable, it seems to me that the facts proved here clearly exhibit the two separate elements, first, antecedent acts occasioning suspicion, and bringing the respondent into the class of suspected persons, and, secondly, an act which was the culminating point of a long series of acts, and it was that final act that caused him to be arrested. I think that the two separate elements are quite clearly shown here, and that the conclusion which the magistrate was apparently willing to draw, but for some passages to which his attention had been directed in the case in the Court of Appeal, was the conclusion that there were here antecedent acts giving rise to suspicion, and finally the act occasioning the arrest, and, if that is so, then I think that, on the unimpaired strength of the judgment of this court in *Hartley* v. *Ellnor* (2), the conclusion of the magistrate might well have been different.

I would add only one further word. This section seems to me to be limited and safeguarded in more ways than one. It is not merely, as has been pointed out as well by this court in *Hartley* v. *Ellnor* (2) as by the Court of Appeal more recently in *Ledwith* v. *Roberts* (1), that a person who is a suspected person within the meaning of the section must be a person who falls within that class or category. It is important also to observe that the offence is :

> Where a suspected person or reputed thief frequents any street, highway or place of public resort with intent to commit a felony.

It says " frequents ", and the other word is " loitering ". It seems to me that it would be difficult almost to the point of impossibility to contend, even for controversial purposes, that one single act could be held to show that a person was loitering or frequenting. The expression seems to involve the notion of something which to some point, at any rate, is continuous or repeated, and the effect of such a word as " frequenting " or " loitering " therefore militates against the too harsh, in one aspect of the matter, or too easy, in another aspect of the matter, view which might be taken of the meaning of this section.

In those circumstances, it seems to me that, on the facts found by the magistrate in this case, and regard being had to the nature of the materials upon which he found those facts, there is nothing in the decision of the Court of Appeal in *Ledwith* v. *Roberts* (1) to prevent there being taken that view of the law which was expressed by this court in *Hartley* v. *Ellnor* (2). That being so, in my opinion this appeal succeeds, and the case ought to go back to the magistrate with that direction.

BRANSON, J. : I agree, and I desire to add only a few words as to the decision of the Court of Appeal in *Ledwith* v. *Roberts* (1). The facts of that case were in no sense comparable with the facts in the case now before this court. The case of *Hartley* v. *Ellnor* (2) became material for examination in the Court of Appeal only because it was used by the appellant as an authority for the proposition which is set out in the argument of Mr. Maxwell Fyfe, at p. 237. It was being used for this purpose. Counsel said :

> The allegation [in the defence] that the two police officers suspected on reasonable grounds that the two plaintiffs were about to commit a felony was a sufficient allegation that the plaintiffs were " suspected persons " within the meaning of the statute.

For that contention *Hartley* v. *Ellnor* (2) was cited. LORD HEWART, L.C.J., has called attention to what *Hartley* v. *Ellnor* (2) really did decide, and, without going through it again, all I need say is that it appears to me to be obvious that *Hartley* v. *Ellnor* (2) was no authority for the proposition for which it was being cited to the Court of Appeal in *Ledwith* v. *Roberts* (1). The Lords Justices took somewhat different views as to the correctness of the decision, and again LORD HEWART, L.C.J., has called attention to what they said, except that there was one passage in the judgment of GREER, L.J., to which he did not refer, and to which I should like to refer. That is the passage where GREER, L.J., says, at p. 250:

> In my view this decision [*Hartley* v. *Ellnor* (2)] was plainly right, because the evidence showed that at the time of the arrest he had brought himself within the description of a suspected person . . .

For these reasons I agree with the judgment that has been pronounced, and have nothing further to add in respect of it.

PORTER, J.: I agree. I can say what I want to say in a very few words. The magistrate, in the opinion he gives, says that he was of opinion that the respondent could not be, not was not, a suspected person. As I understand it, for the reasons given by LORD HEWART, L.C.J., and by BRANSON, J., this court has come to the conclusion, with which I agree, that the respondent could be classified as a suspected person. The reason, as I understand it, for which the magistrate gave that decision was that he thought the case of *Hartley* v. *Ellnor* (2) had been overruled. Again this court takes the view that this case has not been overruled, and is still of as much efficacy as it ever has been. For those reasons, I agree with LORD HEWART, L.C.J.

Appeal allowed.

Solicitors: *Solicitor to the Metropolitan Police* (for the appellant); *Ronald J. Cassels* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re COUSENS.

[KING'S BENCH DIVISION (Branson, J.), **December 10, 1937.**]

Work and Labour—National health insurance—Exemptions—Military service of the Crown—Territorial officer.

A. E. C. was a lieutenant and quarter-master in the Territorial Army. He had received a commission signed by His Majesty. His pay was paid to him by cheques of the county Territorial Association, and the Association was repaid out of moneys provided by Parliament under the Territorial and Reserve Forces Act, 1907:—

HELD: A. E. C. was employed in the military service of the Crown, and was not insurable under the National Health Insurance Act.

[EDITORIAL NOTE. It was suggested that in this case the exemption by reason of employment in the military service of the Crown was restricted to service in the Regular Army, and reliance was placed upon the case of *Derbyshire County Council*

v. *Middlesex County Council* (1). This case was, however, distinguished, and the exemption was held to apply to persons in the Territorial Army.

As to the Army and National Health Insurance, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, p. 979, para. 1756. For the National Health Insurance Act, 1936, Sched. I, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 29, pp. 1188-1191.]

Case referred to:

(1) *Derbyshire County Council* v. *Middlesex County Council*, [1936] 1 K.B. 533; Digest Supp.; 105 L.J.K.B. 101; 154 L.T. 125.

Appeal by way of case stated against a decision of the Minister of Health that the employed man, Albert Edward Cousens, was employed in the military service of the Crown. The facts are fully stated in the judgment.

J. M. Marchington for the appellant.

Valentine Holmes for the respondent.

Branson, J.: This case raises a short point by way of case stated in the following way: The case is stated by the Minister of Health under the provisions of sect. 161 of the National Health Insurance Act and the rules of the Supreme Court made in relation to it.

The facts which are set out are, quite shortly, that Albert Edward Cousens, after serving in the regular Army for a number of years, received on Nov. 10, 1931, a commission as lieutenant and quarter-master in the 6/7th Battalion of the Manchester Regiment, Territorial Army, which he held until the date of his death. It is now suggested by his widow, who is the applicant, that he was employed in a way which made him insurable under the National Health Insurance Act, 1926. The question whether he was or was not so insurable depends upon whether or not his employment as lieutenant and quarter-master in the Territorial Army was employment in the military service of the Crown. The Minister has heard the application, and has decided that he was employed in the military service of the Crown. There is no dispute as to the facts of the case, which are stated in the case stated. They show, without going through them in detail, that the deceased was employed in the ordinary way in which officers of the Territorial Army are employed. He received a commission signed by His Majesty. His pay was paid to him by cheque of the Association, and the Association was repaid out of the moneys provided by Parliament under the Territorial and Reserve Forces Act. Dealing with the matter apart from authority, it appears to me that a man who holds His Majesty's Commission in the Territorial Army is in the military service of the Crown, but it is said that there is authority for saying that he is not.

Mr. Marchington puts the matter in two or three different ways. He says, first of all, that, if one looks at the status of the deceased, it is found to differ in many ways from that of an officer in the Regular Army. He could not be summoned to come out as a member of the Force in aid of the civil power. He could not be asked to go on foreign service, unless and until the Territorial Forces were embodied. No doubt that is so, but that shows only that he was not in the Regular Army. It does not show that he was not in the military service of the Crown, unless it is right to say that nobody who is not in the Regular Army can be in the A military service of the Crown. Then he relies very strongly—and quite properly so—upon a case decided in 1936, *Derbyshire County Council* v. *Middlesex County Council* (1). In that case the Divisional Court had to decide whether a soldier or—let me not beg any question by the word I use—a man who was a member of the Territorial Army, while attending B the annual training camp of that Force, was serving in the military service of the Crown as a soldier within the meaning of the Poor Law Act, 1930, s. 93 (1) (*a*). Sect. 93 (1) says:

> No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order: Provided that any time during which he C has been (*a*) serving in the . . . military . . . service of the Crown as a . . . soldier . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned.

Of course, it appears at once that the language which the court was construing there was not the language which I have to construe here. D The question here is whether this deceased man was in the military service of the Crown as a soldier, which may, and, as it seems to me, did, lead to the court there holding that the territorial in his annual camp was not serving in the military service of the Crown as a soldier.

Mr. Valentine Holmes has directed my attention to the statute under E which the Territorial Army was constituted and, when one refers to that enactment, it seems to me to be quite impossible to avoid the conclusion that Parliament regarded persons who were members of the Territorial Army as persons who were serving in the military forces of the Crown—in other words, in the military service of the Crown. The Act in its long F title begins by saying that it is:

> An Act to provide for the re-organisation of His Majesty's military forces . . . and maintenance of a Territorial Force.

Sect. 1 (1) begins by saying:

> For the purposes of the re-organisation under this Act of His Majesty's military forces other than the regulars and their reserves, and of the administration of those forces when so re-organised . . . .

G Then it proceeds to say that associations shall be constituted. It seems to me to be as clear as possible that the language of that subsection shows that the legislature regarded the Force which was being called into being, and which was going to be administered by the Association, H as one of the military forces of the Crown, other than the regulars and their reserves. The same kind of expression is used again in sect. 2 (1), where it is made the duty of an Association, amongst other things, to:

> discharge such powers and duties connected with the organisation and administration of His Majesty's military forces as may for the time being be transferred or assigned to it . . . .

Sect. 3 provides that the Association is to be paid for the necessary expenditure connected with the exercise and discharge by the Association of its powers and duties out of money voted by Parliament for Army service. I think that it is unnecessary to refer to any other passages in that Act, as it is, to my mind, quite plain, as I have said, that the Act treats the Territorial Army as a part of His Majesty's military forces. If that is so, service in that Army must be service in the military service A of the Crown. Therefore, for these reasons, I think that the Minister came to a correct conclusion in the matter.

There is a further point to which my attention has been called by Mr. Valentine Holmes, and that is with reference to reg. 929 of the regulations made under sect. 7 of the Territorial and Reserve Forces Act. That B regulation reads :

> Officers and men of the Territorial Army while acting in their capacity as such are persons in the military service of the Crown and therefore excluded from the scope of the Workmen's Compensation Acts.

That, of course, is exegetical in its form of expression. It may well be C that, if a properly constituted tribunal came to the conclusion that the author of that regulation had not correctly interpreted the law, it would not be binding. I therefore treat it merely as a passage from which one can draw the comforting conclusion that the opinion I have formed—that officers and men in the Territorial Army are in the military service D of the Crown—is not my opinion only, but is shared by those who have the drawing up of the regulations for that Force.

The result is that all that remains for me to do is to certify accordingly.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *J. Arnold Hancock*, Manchester (for the appellant) ; *The Solicitor, Ministry of Health* (for E the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

APPEAL OF GARDNER, *Re* MASCHEK, *Re* TYRRELL. F

[KING'S BENCH DIVISION (Branson, J.), **December 9, 1937.**]

Work and Labour—Unemployment insurance—Insured person—Employment otherwise than by way of manual labour—Modeller—Production of ornament precisely defined and not creation of employee's artistic taste—Unemployment Insurance Act, 1935 (c. 8), *Sched. I, Part II, para.* 9. G

The work of the employees, who were modellers, was to mould clay into ornaments and other things, according to the employer's instructions, and for this purpose they were supplied with photographs and detailed working drawings, so that the finished model was a reproduction of something conveyed to them by the drawings and photographs, and not an artistic creation of their own. It was contended that these H employees were engaged in " employment otherwise than by way of manual labour " :

HELD : the substantial nature of the employment, which was the criterion to be applied, was manual labour, and the employment was not " employment otherwise than by way of manual labour " within the meaning of those words in the Unemployment Insurance Act, 1935, Sched. I, Part II, para. 9.

[EDITORIAL NOTE. The words "employment otherwise than by way of manual labour" are construed with reference to the opinions given in the House of Lords upon the same words as used in the Workmen's Compensation Act. The question as to the nature of such employment is said to be essentially one of fact, but the present judgment considers very fully the gradation of employments from the case of those who merely make articles from detailed drawings to that of those who A produce, not an article from drawings or models supplied to them, but one which is a creation of their own.

AS TO PERSONS INCLUDED WITHIN COMPULSORY UNEMPLOYMENT INSURANCE, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, pp. 885-888, paras. 1571-1575; and FOR CASES, see DIGEST, Vol. 44, pp. 1304-1307, Nos. 83-132.]

Case referred to:

B (1) *Jaques* v. *Steam Tug Alexandra*, [1921] 2 A.C. 339; 34 Digest 253, *2172*; 90 L.J.K.B. 1325; 126 L.T. 46; 14 B.W.C.C. 148.

APPEAL under the Unemployment Insurance Act, 1935, against two decisions of the Minister of Labour that one Hans Leopold Maschek and one Norman Frederick Tyrrell respectively were not employed persons C within the meaning of the Act in respect of their employment as modellers for the Gaumont-British Corporation, Ltd., during various periods in 1934, 1935, and 1936.

R. E. Borneman for the appellant.

W. Arthian Davies for the respondent.

D

BRANSON, J.: The question, as it seems to me, resolves itself really into a question of fact. The principle to be applied in ascertaining the facts has been variously stated in a variety of cases which have been cited to me by counsel on each side, to whose assistance I must E confess myself very much indebted. I do not know that one can state the principle better than it is stated in the case of *Jaques* v. *Steam Tug Alexandra* (1), although that was a case under the Workmen's Compensation Acts and this is a case under the Unemployment Insurance Acts. The expressions that are used are really the same, and therefore F I think it is fair to look to the case in the House of Lords as an authoritative exposition of the principle to be applied. In that case, what the House had to decide was whether an employee was employed otherwise than by way of manual labour. The words of the statute with which I am dealing are exactly the same: "employment otherwise G than by way of manual labour." LORD BUCKMASTER said, at p. 342:

> The difficulty that arises in the construction of the statute is due to the number of employments in which it is impossible to assert that the employment is solely manual labour or is solely exclusive of manual labour, and it has been held in a series of cases approved in the present instance by the Court of Appeal that in these circumstances the real test is what is the substantial nature of the employment. H If that be manual labour the fact that there are other duties performed that could not be so described does not take the employee outside the benefit of the statute. If, on the other hand, the substantial part of the employment cannot be described as "manual" labour, the fact that manual work has to be performed does not bring him within.

That, of course, was a very excellent test which was before the House of Lords for decision. The case there was whether a tug master was employed otherwise than by way of manual labour, and there he was employed in a variety of different ways, because at one time he was in command of his tug and at another time he was scrubbing the decks, and painting and scraping the ship, and helping to coal. Therefore it was easy in that case to say: Consider what is the substantial employment, and never mind whether he is sometimes employed in the A way of manual labour and sometimes employed otherwise than by way of manual labour. One has to see what is the substantial nature of his employment. The difficulty of applying that case to the present arises from the fact that the employees with whom I have to deal were not employed in a variety of different employments. They were em- B ployed in one employment, and that employment was as modellers, in the course of which employment they had to make what they called armatures to carry clay. They had to build the clay on to those armatures, and they had to mould the clay, when they got it there, and make something which represented what they were told to make, as nearly as they C could do it. In order to be instructed as to what they were to make, they were supplied with photographs, they were supplied with working drawings which, in the instance to which I was directed as the most complete instance, contained in every detail the shape and form and size of the moulding, the capital and the flowery design which had to be D reproduced as the decoration of a doorway. LORD SUMNER, in the same case, also expressed his opinion as to the way in which the decision in that case should be approached, and I think his opinion was to the same effect, that what one had to do was to look at the substantial nature of the employment in which the employee was engaged, or to E perform which the employee was engaged. I alter my language in order to make it clear that it is not the fact nor the law that one can look at different kinds of employment in which a man happens to be engaged at different moments. One has to look at the nature of his employment as a whole, and to decide according to that. F

I do not propose to go in detail into the many cases which have been cited, because it really seems to me that, whoever was responsible for producing the little sheet headed "Manual Labour" and called "Form X65, Oct., 1936," has set out the effect of those cases with great accuracy, so much so that I propose to read some paragraphs of it as expressing— G in my opinion quite correctly—the kind of question that one has to ask oneself when one has to determine whether or not a person comes within the expression "employed otherwise than by way of manual labour." Para. 3 of the leaflet says:

H

> The question whether a particular worker is employed by way of manual labour is a question of fact. It does not follow that he is so employed merely because his duties involve a certain amount of actual physical labour. The real and substantial character of the employment is what must be considered, to the exclusion of matters which are merely incidental or accessory, and where the employment is substantially for manual duties, whether or not involving heavy physical exertion, it is employment by way of manual labour, and not excluded from compulsory insurance.

I have nothing but praise for that way of stating the points to be considered. Para. 4 continues :

> If, however, although a worker is called upon to perform manual work to a certain extent in the course of his work, his principal duties are of a different nature —if, for example, he is mainly occupied in clerical or accounting work, or in supervising the work of others or in managing a business or a department of a business, or in salesmanship, or if the successful execution of his work depends mainly upon the display of taste or imagination or the exercise of some special mental or artistic faculty, or the application of scientific knowledge as distinguished from manual dexterity—he is not employed by way of manual labour.

That also expresses the test, perhaps not with the completeness with which para. 3 deals with the matters referred to herein, but accurately so far as it goes. All that I think it is necessary to add to it—it is perhaps not in addition to the principle, but to the particular facts which have to be looked for—is that, if one finds a man employed because he has the artistic faculties which will enable him to produce something wanted in the shape of a creation of his own, then obviously, although it involves a good deal of manual labour, he is employed in order that the employer may get the benefit of his creative faculty, and not because his employer wants a certain number of tons of stone removed by a sculptor's chisel from a block of marble or granite in his studio. On the other hand, if he is employed because he has the manual dexterity necessary to make him—to use an expression which I think Mr. Maschek used—a suitable tool in the employer's hand to produce something which he has in his mind, and which he wants created, and which, if he had the manual dexterity and the time, he would create himself, then I think that the employee is properly regarded as being in the category of a manual labourer, and not as being employed otherwise than as a manual labourer. I think that it would be very difficult and very dangerous to attempt to lay down any form which could be applied with any rigidity to any particular case. That can be seen at once when one thinks of the instances which were discussed in the argument of the case. Take a man who carves wood. The ordinary workman who puts a key pattern on to the backs of the chairs, or on to sideboards or other furniture, would, I suppose, be considered by everybody to be nothing more than a manual labourer, employed in manual work. But one can go from him, by infinite gradations, through more and more skilled people—whose manual dexterity, perhaps, may be greater, perhaps, may be no greater, but yet who bring more and more of the artistic sense into their productions—until one gets to the stage of a man like Grinling Gibbons, whom nobody would pretend to think came within the category of a manual labourer, and not an artist. Similarly with the sculptor. One cannot draw any hard-and-fast line between the man who cuts patterns in soft stone and the man who from that becomes a monumental mason, and gradually goes on and on, and may end up by being a first-rate sculptor. One cannot really draw an *a priori* line enabling anybody to say that A. is on this side and B. is on that. The matter must always rest, in the last resort, upon the opinion formed based upon the facts of the individual case. Such tests as those laid down in this excellent leaflet, and such tests as one finds in other cases, are not, and do not pretend to be, more than mere guides as to the lines upon which one ought to approach the decision of these cases.

In the present case, approaching it, then, in the hope of being able to follow those lines, and yet approaching it as a question of fact, and depending upon its own facts, it seems to me that, having regard to the evidence of Mr. Murton, these particular people were not regarded as people who could be trusted to create, but that they were supplied, as far as possible, with every detail to enable them to produce, not anything which it was in their minds to create, but something which the art director of their employers had thought of, had invented, and wanted to be brought into being. He said: "We have given the men as close detail as we can by drawing, by photograph and by model." A little earlier he said: "We endeavour to supply the men with as much detail as we can, according to the skill of the man." When one looks at the photographs and sketches which have been produced, one finds, as I have already said, that full-size working drawings appear to have been given, down to the very last detail, and, even if it were the fact that they were left to reproduce some small conventional matter which it was inconvenient to show upon the working drawings, that would not alter the opinion which I have formed. I think that these two men are on the side of the line which makes them to be employed by way of manual labour, and, therefore, that they are employed persons within the Acts.

Solicitors: *Shaen, Roscoe, Massey & Co.* (for the appellant); *The Solicitor, Ministry of Labour* (for the respondent).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

D/S A/S GULNES *v.* IMPERIAL CHEMICAL INDUSTRIES, LTD.
THE GULNES.

[KING'S BENCH DIVISION (Goddard, J.), **November 30, 1937.]**

Shipping—Charterparty—War risks—Agreement to pay demurrage and/or dead freight if ship detained by any cause—Ship damaged beyond repair—Frustration.

The defendants chartered from the plaintiffs a ship to proceed to San Juan, a port close to Seville in Spain, and there to load a cargo of ore. On account of the war in Spain, the following marginal clause was inserted in the charterparty: "If the steamer is detained at San Juan by any cause arising from the civil war in Spain, riots, strikes, etc., charterers agree to pay demurrage and/or dead freight." On arrival at San Juan, the ship was immediately struck by a bomb from an aeroplane, belonging presumably to the Spanish government, and damaged beyond repair. There was not time before the bomb struck the ship to give notice of her readiness to load:—

HELD: the language of the marginal clause was wholly inapt to cover the case of a ship destroyed so that she was no longer a cargo-carrying ship. The claim for demurrage or dead freight therefore failed.

[**EDITORIAL NOTE.** The very serious damage caused to this ship is treated as a frustration of the contract entered into by the charterparty, and the reason of such frustration is the destruction of the subject-matter of the contract. The marginal clause is treated as being effective so long only as the vessel remains a cargo-carrying ship. Thus it is said that the clause would have applied if one of the contending parties in the war had merely prevented the ship's departure from the port, but it had no application to the case where the ship was so badly damaged that she could not be repaired and thus become available again for the carriage of cargo.

AS TO DEMURRAGE, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 124-127, paras. 206-211; and FOR CASES, see DIGEST, Vol. 41, pp. 558-565, Nos. 3838-3900.]

Case referred to:

(1) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 12 Digest 371, *3093*; 32 L.J.Q.B. 164; 8 L.T. 356.

ACTION to recover demurrage and/or dead freight or damages for detention. The facts and the particular clause of the charterparty are fully stated in the judgment.

Sir Robert Aske, K.C., and *J. V. Naisby* for the plaintiffs.

H. U. Willink, K.C., and *W. L. McNair* for the defendants.

GODDARD, J.: This case raises a short question of construction under a marginal clause of a charterparty. It arises in this way. In Sept., 1936, Imperial Chemical Industries, Ltd., the defendants, had chartered the plaintiffs' steamship Gulnes to proceed to the port of San Juan on the Guadalquivir, quite close to Seville, and there to load a cargo of ore. On account of the civil war which was then proceeding in Spain, and as the port of San Juan is very close to Seville (which was then, and is now, in the hands of the insurgents), and as Seville at that time was still subject to an attack by government forces, the shipowners inserted in the charterparty a marginal clause in these terms:

> If steamer is detained at San Juan by any cause arising from the civil war in Spain, riots, strikes, etc., charterers agree to pay demurrage and/or dead freight.

What happened was this. The ship arrived at the mouth of the Guadalquivir on Dec. 6, obtained customs papers, sailed up the river, and arrived at San Juan on Sunday, Dec. 7, where she made fast to a quay. What then happened was as lamentable as it was shocking. A government aeroplane—or an aeroplane which was assumed to be a government aeroplane, because it was evidently attacking Seville for some reason or another—dropped a bomb or bombs on San Juan—I suppose regardless of the shipping which was in the port—and one of these bombs struck this unfortunate Norwegian steamer, killed the first officer, killed other members of the crew, and obviously, from the captain's evidence, inflicted shocking injuries on others, and put the ship entirely out of commission. It was not a question of merely damaging the ship, so that she could be repaired, and there is no question about the extent of the damage. When the master gave his evidence, he was asked: " At any rate, it is clear, is it not, that she was so badly damaged that she was not worth repairing, and was only fit to be broken up?" He answered, "Yes." That is, in fact, what happened to her. She lay in the river until Dec. 31 or Jan. 1, when she was towed to Gibraltar. It was then found that she was not worth repairing, and she was broken up. In any circumstances, during the whole of the time that she was in the river at San Juan, she was not fit to load a cargo. There is no question about that.

Sir Robert Aske has argued that the marginal clause here is inserted to ensure that, if the steamer went to this dangerous port, she should at least get her freight, and get the profit that she would have made had she carried out the voyage. He contends that the intention of the clause is that, once she gets to San Juan, she is to be paid demurrage and dead freight, although he concedes that perhaps, in certain circumstances—as, for instance, if she were sunk—she might not get demurrage, but she would, at any rate, be entitled to dead freight. I may say—and I say it because Mr. Willink laid some stress upon it—that, in the view I take of the case, it does not make any difference. She was struck by the bomb before any obligation to load had attached to the charterers. She had not had time to give notice; she had only tied up a few minutes before. The captain apparently left the wheel-house just before the bomb struck the ship, thereby saving his life. He had gone to get his dinner, and nothing at all had been done in the way of giving any notice. Whatever may be the object of inserting this clause, I can only give effect to the language which the parties have used, and, in my judgment, the language of this clause is wholly inapt to cover such a case as we have here. Here we have a ship destroyed as a cargo-carrying ship, and it seems to me that this clause is applicable only where the ship remained a cargo-carrying ship—that is to say, a ship capable of carrying cargo, or capable, if she was damaged by some matter arising out of the civil war, of being repaired in a reasonably short time. I do not think that it applies to a case where the ship is destroyed. If the ship is destroyed—and I am using the word "destroyed" in the sense of destroyed as a cargo-carrying ship—if she is sunk, or so badly damaged that she cannot be loaded, and is, in fact, lost, it seems to me that it would be a misuse of language to talk about the ship being detained, in those circumstances. As I put it to Sir Robert at a very early stage of the case, if the bomb had passed through the ship, knocked a hole in her bottom of such a size that she at once sank, or, if the water was not very deep there, settled on the mud and remained there as a wreck, it would be a very odd way of expressing the situation to say that the ship was detained. Of course, if she had been refloated, or if the leak was not a serious one, and the necessary repairs could be done in a very short time, so that the ship could not be regarded as lost, different considerations might apply. I think that we have here a case which brings it within the ambit of the line of cases of which *Taylor* v. *Caldwell* (1)

is a leading example. Here you have a frustration by the destruction of the subject-matter, which the parties must have contemplated would always remain in existence. I do not think that this clause makes provision for the destruction or damaging of the ship to such an extent that it no longer remains a cargo-carrying ship. It would be perfectly
A easy, by the use of appropriate words, to make that provision, to say that the owners should pay the freight whether the ship was destroyed by the events of the civil war or was seized or requisitioned or what not. I do not think that the parties have done so. I think that the clause contemplates "detention" in the ordinary sense of the word—that is
B to say, that she is delayed, it may be for quite a long period. But, if she be delayed—either because the civil war prevented the charterers from loading, or some act of either the government or the insurgents prevented the ship from sailing—then I think that the clause would have effect. I think also that there is a great deal to be said for Mr. Willink's
C contention that this is really corollary to cl. 10 of the charterparty. I will not decide whether the failure to load owing to the action of the contending parties in Spain would have been "any cause whatsoever beyond the control of the shippers or receivers," or whether that clause has to be read *ejusdem generis* with "by reason of floods, frosts, bad
D weather," and so forth. I am inclined to think that it has not. But, whether that is so or not, I think that very likely the framers of this clause may have had cl. 10 in mind, and wanted to say: "If you go to this port, you are not to say that the action of the warring parties in Spain is a cause beyond your control, and throw all that loss upon us. You
E will have to bear that loss, and you will not go to Spain unless you do." The clause would have worked in favour of the owners if the ship had remained, and, after loading, the forces of one side or the other had prevented her from sailing. However that may be, whether this is to be regarded as an extension of or a corollary to cl. 10 of the charterparty,
F I am clearly of opinion that the words are not apt to apply to the state of circumstances that exists here. I think, as I have already said, that the case is governed by the line of authority, of which *Taylor* v. *Caldwell* (1) is a leading example, which has been applied to shipping in cases of detention. Consequently, I give judgment for the defendants. I have
G to add only that, in the event of a higher court taking a different view, the demurrage has been agreed at £282 15*s*. and the dead freight at £500.

Judgment for the defendants with costs.

Solicitors: *Sinclair, Roche & Temperley* (for the plaintiffs); *William Morris* (for the defendants).

H [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MORGAN *v.* SCOULDING.

[KING'S BENCH DIVISION (Lewis J.), **December 8, 1937.**]

Negligence—Personal injuries—Damages—Assessment—Shortened expectation of life—Instantaneous death—Law Reform (Miscellaneous Provisions) Act, **1934** *(c.* **41***), s.* **1**.

The deceased was killed instantaneously in a collision between a motor cycle and a motor car. His administrator in an action for damages for personal injuries included a claim under the Law Reform (Miscellaneous Provisions) Act, 1934. It was contended that no damages for loss of expectation of life could be recovered where the death was instantaneous :—

HELD : the cause of action in such a case was the collision, which must be taken to have occurred before the death, and damages for loss of expectation of life were recoverable.

[**EDITORIAL NOTE.** The distinction between this case and others which have dealt with the same subject is that here the death was instantaneous, and it was argued that there was no such period of time as is required for the vesting of the cause of action in the deceased. It is, however, held that the actual cause of action is the collision, and not the death, and that there must be some period of time, however small, between these two events.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016 ; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to :

(1) *Rose* v. *Ford*, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

(2) *Trubyfield* v. *Great Western Ry. Co.*, [1937] 4 All E.R. 614 ; Digest Supp.

ACTION for damages for personal injuries by the father of a deceased young man of 23 years of age, suing on his own behalf and in his capacity of administrator of the deceased under the Fatal Accidents Act and under the Law Reform (Miscellaneous Provisions) Act, 1934. On Feb. 14, 1937, the deceased was riding a motor cycle along the Southend road at a speed estimated to be nearly 60 m.p.h., when he came into collision with the defendant's motor car coming out of a side lane. The deceased fell with his head on the kerbstone, and was already dead when the defendant reached him. It was found as a fact that death was instantaneous. The case is reported only upon the question of whether, where the death is instantaneous, damages for loss of expectation of life can be recovered.

The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), (4), provides as follows :

> (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate . . .
>
> (4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

Alban Gordon for the plaintiff.

Richard O'Sullivan, K.C., and *Reginald Knight* for the defendant.

LEWIS, J. [His Lordship dealt with the question of liability]: A most interesting discussion and argument have taken place in this case with regard to the Law Reform (Miscellaneous Provisions) Act. Putting it shortly, in words which I hope will not do injustice to Mr. O'Sullivan's very able argument, he says that no person who sues in A the position of an administrator of the estate of a deceased man can recover damages for the loss of the expectation of life—or, indeed, any damages for the estate—unless there existed before the death of the deceased a cause of action in him, the deceased man. Mr. O'Sullivan points out—quite properly, in my view—that this Act did not, so to B speak, give any new causes of action. All it did was to say: A. has a right of action, A. dies before that right of action can be enforced. In those circumstances, according to the old law, the action abated; but now, if A. has a cause of action, his or her death does not prevent his or her representatives from filling the gap and carrying on that action C as though the deceased person were still alive. I am putting the point, I hope, correctly, but in a nutshell. Mr. O'Sullivan says that the result of that is that, where a person is killed instantaneously, that person has never acquired a right of action, and that, therefore, there is nothing which, so to speak, comes down to the administrator.

D That argument has given rise to a very interesting discussion. What has to be borne in mind is that, in these cases where actions are brought arising out of accidents resulting in death, the wrong done is not strictly the death. The wrong done which gives rise to the cause of action is the injury, which may or may not sooner or later result in death. A E person who is still alive can, and always has been able to, bring an action in such circumstances, and to say: "As part of my damages I want something for my loss of expectation of life." It is not necessary at all that the person should be dead to bring that action. If he is dead, as was pointed out in the case of *Rose* v. *Ford* (1), which has been F discussed at some length, the only effect is that the administrator who is bringing the action is in a much better position to lay before the court what the loss of the expectation of life has been. When the person is still alive, it may be that some medical gentleman will say: "He is a man who ought to have lived until seventy. You have injured him G at forty, and he has probably got only another five years to live." That is pure speculation—based, of course, on medical knowledge—and it may be that one doctor will give the man one year to live while another doctor will give him twenty years to live. I have been told by Mr. O'Sullivan in the course of this case that medical opinion differed very H much in the particular case he was in. One set of doctors said that the man would not live more than a year. That was three-and-a-half years ago, and the man is still alive. That instance illustrates how doctors may err upon these matters.

The only real effect that the death has in this connection is that it enables the court far more easily to gauge how much of the man's life has been lost by reason of the fact that he has been killed. Although the point of which Mr. O'Sullivan has taken is one of extreme interest, he bases himself on the actual words of the section and on certain sentences used by the learned Lords in the case of *Rose* v. *Ford* (1), and I think that the answer to it has been put quite correctly by counsel for the plaintiff. He says that one cannot go into all these metaphysical discussions, because all that matters is that the injury should have occurred before the death. As I have said, the injury is not strictly the death. No person could have a right of action arising out of the death of a third person. But, if the person who is killed has a right of action before he dies, then that right of action descends to the administrator. It seems to me that the proper way to look at these cases is this: What was the injury, what was the cause of action? In this case, the cause of action was the defendant's collision with the deceased man, whereby the deceased man was thrown from his bicycle and killed. The cause of action was not the death, but the negligence of the defendant in colliding with the deceased man on his motor cycle. That happened before the death, and, although there may have been only a split second, or a very short interval of time, between that collision and the man's death, the cause of action arose before his death. If it did arise before his death, then that cause of action would descend to the administrator. That, I think, is the answer to the extremely interesting argument put forward by Mr. O'Sullivan. I hope, for a great many reasons, that my conclusion is the right one, because it seems to me that, if I am not right, it is going to lead to all sorts of complications. Evidence will be called to show that the man lived for five seconds after the accident, or ten seconds after the accident, and it seems to me that it would be impossible in ninety-nine cases out of a hundred to say whether a man had been killed instantaneously, and to say that in the same fraction of a second as the injury was sustained he died. If the court is reduced to that, there will be still greater difficulties in administering this particular Act of Parliament. In those circumstances, I hope very much that what I have said with regard to it is right. Simply because I see awful vistas of difficulties if I am not right, that is, of course, no reason for deciding the case in the wrong way, but I think that that is the answer to the point. I think that Mr. O'Sullivan's point is a bad one, although it has been put forward strenuously and has been extremely well argued.

Therefore, I find that the plaintiff, as administrator of the deceased man, is entitled to recover damages in respect of the death of his son. The special damage to an amount of £84 12*s*. 3*d*. has been admitted. The boy who was killed brought into the household—and, no doubt, he actually paid it to his mother, who is the housekeeper—35*s*. per week. Of that sum £1 was expended on the boy himself. That is to say, it cost about £1 to keep him at home, so that the mother, or the housekeeping fund in general, was in credit from that payment to the extent of 15*s*. per week. How long that would have gone on, which is a matter I have to consider, one does not know. He was only 23. He was in a very good position, and it was apparently hoped that in time he would give up the position at which he was earning £4 per week and become the licensee of some public house which his father would acquire. His A father has told me that he knew that his son was not engaged to any lady, and that he knew that he had not any immediate prospects of getting married. In those circumstances, one has to speculate as to how long this sum of 15*s*. per week would be coming into the household. The only data I have is that he was hoping to become a licensee of a B public house. He would perhaps still pay something towards the keep of his father and mother. Apparently his affections were not engaged elsewhere, and he might have remained a bachelor. On those facts, one has to try to arrive at some figure for the loss which the father and mother have suffered. I think that to meet that loss the sum of £300 C should be awarded under Lord Campbell's Act.

With regard to the other point, it seems to me, speaking for myself, a most extraordinarily difficult task to assess the loss of the expectation of life. I have considered it in the light of what was said in *Rose* v. *Ford* (1) and in other cases, and what has been said since then in *Trubyfield* D v. *Great Western Ry. Co.* (2), which GREAVES-LORD, J., decided the other day, and I think that the proper sum to award under the Law Reform (Miscellaneous Provisions) Act is £1,000.

Solicitors: *Berry Tompkins & Co.* (for the plaintiff); *W. Stanley Eastburn* (for the defendant).

E

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

FEAY *v.* BARNWELL.

F

[KING'S BENCH DIVISION, MANCHESTER MICHAELMAS ASSIZES (Singleton, J.), **December 8, 9, 1937.**]

Negligence—Personal injuries—Damages—Overlapping of damages—Adjustment in respect of death duties and administration expenses.

G In a street accident, a blind man, 73 years old, was injured, and his wife, 71 years old, was killed. The defendant's negligence was admitted, and damages therefor, in so far as it resulted in the death of the wife, were assessed by the judge at £600 under the Law Reform (Miscellaneous Provisions) Act, 1934, and, if they had been recoverable in full, at £625 under the Fatal Accidents Acts. It was agreed that the death duties and testamentary expenses in respect of the wife's estate would be £25:—

H HELD: in order to prevent overlapping of damages the £600 ought to be deducted from the £625, but, having regard to the administration expenses, the £600 should be reduced by the £25 before the deduction was made, with the result that, in respect of the claim under the Fatal Accidents Act, the claimant would receive £50. The plaintiff, therefore, would receive under the Law Reform (Miscellaneous Provisions) Act, 1934, £600, and, under the Fatal Accidents Acts, £50, apart from special damage.

[**EDITORIAL NOTE.** This case considers the practical application of the directions contained in the opinions of the Law Lords in *Rose* v. *Ford* (1) for the prevention of overlapping in the awards of damages under the 1934 Act and under Lord Campbell's Act. It will be noticed that it is only so much of the amount awarded under the 1934 Act as will ultimately reach the plaintiff that is taken into consideration. In the present case this leads to an adjustment in respect of the estate duty and administration expenses.

As to Damages for Personal Injuries, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016; and for Cases, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to:

(1) *Rose* v. *Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.

(2) *Trubyfield* v. *Great Western Ry. Co.*, [1937] 4 All E.R. 614; Digest Supp.

(3) *Morgan* v. *Scoulding*, [1938] 1 All E.R. 28; Digest Supp.

(4) *Flint* v. *Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.

(5) *Berry* v. *Humm & Co.*, [1915] 1 K.B. 627; 36 Digest 139, *932*; 84 L.J.K.B. 918.

Action by a widower claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and under the Fatal Accidents Act, 1846, in respect of negligence causing the death of his wife. The facts are fully stated in the judgment, but liability was admitted.

F. E. Pritchard, K.C., and *A. D. Gerrard* for the plaintiff.

W. Gorman, K.C., and *Fenton Atkinson* for the defendant.

Singleton, J.: The plaintiff, Mr. Henry Feay, claims damages in respect of an accident which happened on May 8, 1937, and in which his wife was killed, and he was injured. The plaintiff was 73 years old at the time of the accident. His wife was 71 years old. He was completely blind. He commenced to go blind some 20 years ago, or a little more, and for the last 15 or 17 years he had been completely blind. His wife, who looked after him, did everything in the house for him. She read to him, and she took him out for walks, and looked after him entirely. On May 8, 1937, the husband and wife were walking along the footpath in Hale Road, Hale Barns, towards Ringway, when the defendant's motor cycle mounted the footpath, brought about the death of the one, and injured the other. Liability was admitted, and the only questions which I had to determine were questions arising on the damages claimed in the action. Mrs. Feay died intestate, and Mr. Feay is entitled to her estate. The plaintiff claims damages, first, for personal injuries suffered by him, and, secondly, under the Fatal Accidents Acts, for damages which he has suffered by reason of the negligence of the defendant, which caused the death of the plaintiff's wife. He also claims, under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrator of the estate of the deceased, the damages due to the estate in a cause of action vested in the estate by the said Act, by reason of the fact that the injury to and the death of the deceased were caused by the act of the defendant.

I deal, first, with the injuries to the plaintiff, which are set out in the statement of claim. His left leg was torn above the ankle, and there was considerable swelling and discolouration of the leg which has not yet completely disappeared. He walks with a slight limp still. He had treatment for some time. Apart from the leg, he has undoubtedly suffered a severe shock. The nurse, who knew him before the accident, described him as by no means the same man as he was before the accident. There are out-of-pocket expenses, which are admitted, of £15 15*s*. Over and above that sum I award to the plaintiff, a man of 73 years of age, for this pain and suffering and injury which he suffered, the sum of £250.

The next claim with which I propose to deal is the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, that, by reason of the death of the deceased due to the negligence of the defendant, there has vested in the said estate a right to damages in respect of the deceased having suffered pain and injury, and having been deprived of the normal expectation of life, and to special damages. Again, there is no question as to the special damages, which are agreed at the figure of £46 13*s*. 9*d*. I was told the nature of the injuries which Mrs. Feay sustained. They are set out in the statement of claim, and, after Mr. Pritchard had told me the history, in so far as he could, of the sufferings of Mrs. Feay, Mr. Gorman told me that he agreed with that statement. There is no doubt that she suffered great pain. She lived for three weeks after the accident, and until the last day she was conscious. It is extraordinarily difficult to assess the amount of compensation for that period of three weeks. It forms only part of that to which her estate is entitled, because her estate is entitled further to damages by reason of her having been deprived of the normal expectation of life. She was 71 years of age at the time of the accident which resulted in her death three weeks later. She was a woman in good health, who had done all the work of the house, and done the washing, and, as I have said already, had looked after her husband with the greatest of care. Anyone who has to deal with a matter of this sort must feel that part of the wife's joy in life was looking after her husband.

There have been several attempts to assess the amount of damages which ought to be paid in respect of the loss of expectation of life. The Court of Appeal in the case of a woman in the twenties, whose death led to the claim in the well-known case of *Rose* v. *Ford* (1), said that the right figure, as they thought, in that case, for loss of expectation of life, was the sum of £1,000. A common jury in this court, a week or so ago, assessed the damages in respect of the loss of expectation of life of a child of 3 years of age at the sum of £90. In *Trubyfield* v. *Great Western Ry. Co.* (2) a judge assessed the damages payable in respect of the loss of expectation of life of a child of 8 years of age at £1,500. In *Morgan* v. *Scoulding* (3) in the case of a man of 23 years of age the judge assessed the damages payable for loss of expectation of life at the sum of £1,000.

It is impossible to say, with any accuracy, what is the right measure of damages, but, as was pointed out by LORD WRIGHT in the case of *Rose* v. *Ford* (1), that is no reason to say that it cannot be done, and an effort has to be made to do it. One must have regard to all the circumstances, and, in this case, to the fact that here we have a woman who was supremely happy in her household duties and in looking after her husband. I think, too, that one must pay regard to the fact that, in the ordinary course, she could not expect to have a very long life. Doing the best I can in all these ways, and having studied that which was said by the Law Lords in the case of *Rose* v. *Ford* (1), I think that the right sum in respect of pain and suffering and loss of expectation of life—and I deal with them together because they were dealt with together in the case of *Flint* v. *Lovell* (4)—is the sum of £600. I see no necessity to state further than I have done how I arrive at the £600, or how it is apportioned under the respective heads of damage, unless there is some particular reason why I should be asked to do so.

The remaining claim is made under Lord Campbell's Act. There, again, there are difficulties in saying what is the right sum. It is clear that only pecuniary loss can be recovered by the husband in respect of the wife's death when the claim is made under the Fatal Accidents Act. But it was said, in the case of *Berry* v. *Humm & Co.* (5), that damages recoverable in such an action are not limited to the value of money lost, nor to the money value of things lost, but include the monetary loss incurred by reasonable services rendered gratuitously by the deceased when there was a reasonable prospect of their being rendered freely in the future but for the death, and therefore the jury was entitled to assess the damages in that particular case. That was a case of a workman who had lost his wife, who had rendered ordinary household duties, and, by reason of her death, he had to provide himself with a housekeeper, and to incur expense. The same kind of consideration arises in the case before me. Mr. Feay had a pension from the railway company—he still has it—of 28*s*. a week. Both he and his wife were drawing an old age pension of 10*s*. a week each. They received help from the son in whose house they lived. He told me he contributed 25*s*. to the household expenses, which would not be much more than enough to keep him in food, I imagine. The husband and wife lived in reasonable comfort on that 48*s*. a week. It is a fact admitted by everyone that, when the wife was killed, not only did her pension cease—the old lady's pension cease—but the 10*s*. which had been paid to the husband ceased, because, on the calculation made by the authorities, it was supposed that 28*s*. a week was enough for the husband. So that, apart from anything else, the household is, in fact, poorer by twice 10*s*. a week—the two old age pensions.

After the death of the wife, the husband had someone to help in the house, but he thinks a change is necessary, and, with the help of his son, he has advertised, and finds that, in order to get someone suitable, he will have to pay 25*s.* a week, and also to provide the keep of that person who comes in to look after him as housekeeper, and, to some extent, as nurse, because he can do little for himself. It must be remembered that someone coming to a house in that way, in the ordinary sense, is not as economical as the wife. Another bedroom is necessary. There is A additional expense of one kind and another. Taking the estimated cost of the keep of the help which the plaintiff will require as £1 a week, I think that there is a clear loss of at least £2 5*s.* a week. It may be a little more, but it is at least that.

Then I have to consider what amount the plaintiff is entitled to B receive by way of a lump sum in respect of the loss which he has sustained through the death of his wife. I ought to say that there was in the name of the wife, at the time she died, a sum of £151 in some co-operative bank. That, really, was the husband's money. The wife had no separate income. It was the husband's savings, and Mr. Gorman agrees, quite C properly, that I ought not to take it into consideration in any way. Some debts had to be paid out of it in any event, and, by agreement between the parties, I do not consider it further in this case.

I have to approach this case, I think, on the basis of a healthy blind husband of the age of 73, for whom everything was done by a healthy D wife of the age of 71. The kind of loss spoken of by SCRUTTON, J., as he then was, in the case of *Berry* v. *Humm & Co.* (5), is a little over £2 5*s.* a week. The expectation of life of both is inconsiderable. It is rather the joint expectation of life, and of the risks of life, and of the health and ability of the wife to do that which she was doing, that I have to consider. E It is all those matters together. I cannot see, in a case of this sort, why I should take a smaller figure than something in the neighbourhood of 5 years. I state that in order not to disguise it from the parties. I do not think that I ought to disguise how I seek to arrive at what I desire to do in this case. Doing the best I can, I award the sum of £625 as the F damages which would, in the ordinary case, be recoverable under Lord Campbell's Act.

Next, I have to consider the effect of the one upon the other. In the case of *Rose* v. *Ford* (1), LORD ATKIN said, at p. 835:

> I should add that I see no difficulty as to the alleged duplication of damages G under the Act of 1934 and the Fatal Accidents Acts. If those who benefit under the last-mentioned Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected.

I observe that the words of LORD ATKIN are, "will be affected." LORD WRIGHT, in the course of his opinion in the same case, said, at p. 852:

> H There is one other point I ought to mention. It is said that if this element of damage is allowed, there may be a risk of duplication of damages, in particular because the Act of 1934 by sect. 1 (5) provides that the rights conferred by the Act shall be in addition to, and not in derogation of, rights conferred on dependants by the Fatal Accidents Act or other like Acts. If the Act necessarily involved this consequence, it would all the same have to be enforced. But in my opinion the Act does not. I think that in practice no duplication of damages need occur. I think the jury would be properly directed to take into account either that they were at the same time giving damages under Lord Campbell's Act as they did here,

or that such damages had been or might be given. The object of damages in these cases is compensation for the benefit of the estate. It is true that the claims under Lord Campbell's Act are independent and are for separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate in which quite different persons, creditors, legatees or other beneficiaries might be interested. But one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced. The award of damages in the present case shows how duplication may be A avoided. This matter can fairly be left to the good sense of the jury or judge.

It seems to me clear that, as the estate of the widow is, by reason of my judgment, £600 better off than it otherwise would have been, and as that amount goes to the benefit of the husband, I must make allowance for it. I think that, generally speaking, most of it ought to be taken B into consideration. It can be said that, if the husband reaps from the estate of the wife the sum of £600 in respect of her pain and suffering and loss of expectation of life, he does not get the whole of that by reason of its being part of her estate. Some expense is necessary in the way of administration proceedings, I imagine, or some part of the cost of that. C Again, I suppose, there is some duty payable upon it, and there must be some expense. [His Lordship was informed that the duty and administration expenses would amount to about £25.] The total amount which I intend the plaintiff to recover under Lord Campbell's Act, if there was no other claim, is the sum of £625. Following LORD WRIGHT in *Rose* D v. *Ford* (1), I award £600 in respect of the pain and suffering and loss of expectation of life, which forms part of the estate. As that does not reach the plaintiff's pocket whole, I do not deduct the whole £600 from the £625, under Lord Campbell's Act, and give you merely £25. I think the proper deduction from the £625 is £600 less £25, which leaves a sum E of £50.

Judgment for the plaintiff for £962 8*s*. 9*d*. *and costs, being* (*a*) *under the personal injuries claim* £250 *plus* 15 *guineas*—£265 15*s*.; (*b*) *under the* 1934 *Act* £600 *plus* £46 13*s*. 9*d*.—£646 13*s*. 9*d*.; *and* (*c*) *what is left under Lord Campbell's Act* £50. F

Solicitors: *Eltoft & Eltoft* (for the plaintiff); *Slater, Heelis, Sandbach, Marriott, Smiths & Irvine* (for the defendant).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

GEORGE LEGGE & SON, LTD. *v.* WENLOCK CORPORATION.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Maugham, Lord Roche), **November 8, 9, 11, 12, 15, December 22, 1937.]**

A *Sewers and Drains—Natural watercourse—Discharge of sewage—Illegal discharge—Conversion of watercourse into sewer—Public Health Act,* 1875 (*c.* 55), *s.* 4—*Rivers Pollution Prevention Act,* 1876 (*c.* 75), *s.* 3.

A channel, for the greater part of its length in a covered culvert, ran through the plaintiffs' land. Originally the channel was a natural stream or watercourse, but at various times since 1876 sewage had been discharged into it. It was admitted that for at least 23 years B before the pleadings in this action (i.e., from 1909) some 20 houses had been drained into the channel, and it was contended that such houses had acquired prescriptive rights of so discharging sewage into it. A further 44 houses had commenced discharging sewage into the channel at times subsequent to 1925. It was contended that the discharge of sewage into what was admittedly a natural stream at the time of the C passing of the Rivers Pollution Prevention Act, 1876, being an offence under that Act, could not convert the stream or channel into a sewer within the meaning of the Public Health Act, 1875:—

HELD: (i) by committing the offence under the statute of pouring sewage into such a stream, it was not possible to convert the stream into a sewer within the meaning of the Public Health Act, 1875.

(ii) repeated acts in violation of the express terms of a modern statute D passed in the public interest cannot confer any right or rights on the wrongdoer.

Order of Court of Appeal ([1936] 3 All E.R. 599) *affirmed.*
Airdrie Magistrates v. *Lanark County Council* (1) *followed.*

[EDITORIAL NOTE. In the court of first instance it was thought that a stream was not necessarily prevented from becoming a sewer by reason of the fact that E the discharge of sewage into a stream was made illegal by statute. The Court of Appeal felt themselves bound by the authority of *Airdrie Magistrates* v. *Lanark County Council* (1), decided in the House of Lords, to adopt the contrary view, and the House of Lords has not only followed its previous decision, but stated that, even if it had not been bound by that authority, it would have affirmed the decision of the Court of Appeal.

F FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 25, Sewers and Drains, p. 724, para. 1237; and FOR CASES, see DIGEST, Vol. 41, pp. 7-9, Nos. 45-59.]

Cases referred to:

(1) *Airdrie Magistrates* v. *Lanark County Council, Coatbridge Magistrates* v. G *Lanark County Council,* [1910] A.C. 286; 41 Digest 8, 52; 79 L.J.P.C. 82; 102 L.T. 437.

(2) *Falconar* v. *South Shields Corpn.* (1895), 11 T.L.R. 223; 41 Digest 9, *56*.

(3) *Newcastle-upon-Tyne Corpn.* v. *Houseman, Same* v. *Francis, Same* v. *Jackson, Same* v. *Coote* (1898), 63 J.P. 85; 41 Digest 8, *48*.

(4) *West Riding of Yorkshire Rivers Board* v. *Gaunt (Reuben) & Sons, Ltd.* (1902), H 67 J.P. 183; 41 Digest 9, *57*.

(5) *St. Matthew, Bethnal Green, Vestry* v. *London School Board,* [1898] A.C. 190; 41 Digest 14, *100*; 67 L.J.Q.B. 234; 77 L.T. 635; *affg.* S.C. *sub nom. R.* v. *St. Matthew, Bethnal Green, Vestry,* [1896] 2 Q.B. 319.

(6) *A.-G.* v. *Birmingham, Tame & Rea District Drainage Board,* [1910] 1 Ch. 48; 41 Digest 30, *226*; 79 L.J. Ch. 137; 101 L.T. 796; *on appeal,* [1912] A.C. 788.

(7) *Goldsmid* v. *Great Eastern Ry. Co.* (1883), 25 Ch. D. 511; 42 Digest 761, *1873*; 53 L.J. Ch. 371; 49 L.T. 717; *on appeal* (1884), 9 App. Cas. 927.

(8) *West Riding of Yorkshire Rivers Board* v. *Yorkshire Indigo, Scarlet & Colour Dyers, Ltd.* (1902), 67 J.P. 80; 41 Digest 9, *58*.

Appeal from an order of the Court of Appeal (Slesser, Romer and Greene, L.JJ.), dated Nov. 11, 1936, and reported in [1936] 3 All E.R. 599, reversing the order of Crossman, J., dated July 31, 1936, and reported in [1936] 2 All E.R. 1367, in an action in which the appellants were plaintiffs and the respondents were defendants. The facts and the arguments are set out in the opinions.

A. Grant, K.C., *A. M. Trustram Eve. K.C.*, and *G. D. Squibb* for the appellants.

W. Tyldesley Jones, K.C., *Charles Harman, K.C.*, and *Wilfrid M. Hunt* for the respondents.

Lord Atkin: My Lords, the opinion which I am about to read is that of my noble and learned friend Lord Macmillan, in which I concur.

Lord Macmillan [read by Lord Atkin]: My Lords, the problem for solution in this appeal is presented to your Lordships in the unusual shape of a general question of law which emerged and was formulated for separate decision in the course of the proceedings between the parties. There may have been some justification for the adoption of this exceptional course in the special circumstances about to be narrated, but it is to be hoped that it will not become a frequent practice, for it may readily lead to embarrassment, as indeed your Lordships have experienced during the discussion of the case. The question arose in this way. The plaintiffs (now the appellants), who are the owners of certain lands situated in the borough of Wenlock in Shropshire, by writ dated Feb. 26, 1932, instituted proceedings against the defendants, the Wenlock Corporation, as the sanitary authority of the borough. In their claim, the plaintiffs seek, *inter alia*, a declaration that "a culvert running" through their lands and constructed by one of their predecessors in title "is a sewer vested in and repairable by the defendants." They also claim repayment of a considerable sum of money expended by them in repairing the culvert, which had broken down and caused serious flooding in June, 1930.

The action came on for trial before Crossman, J., in July, 1936, and, after the plaintiffs had called part of their evidence, the judge ordered the following question of law to be set down for argument before him:

> Whether the change of status from a natural stream to a sewer within the meaning of the Public Health Act, 1875, claimed in para. 5 (*c*) of the reply and defence to counter-claim to have taken place is in law possible.

In para. 5 (*c*), referred to in the question, the plaintiffs alleged that, at the time when the culvert was constructed by their predecessor, which was before 1882, the channel:

> was a natural stream or watercourse not vested in or repairable by the then local authority, the Madeley Local Board. The amount of sewage discharged into it at that time was not sufficient to change its status to that of a sewer. That change of status by discharge of sewage took place subsequently at a time difficult to estimate with exactness but during the 23 years referred to in para. 7 of the defence. Upon that change taking place, the liability to repair the culvert and inspection shafts, the latter being "buildings, works, materials and things belonging" to the culvert within the Public Health Act, 1875, s. 13, fell upon the corporation, and has at all material times been and is upon the corporation, and the nuisance, annoyance, inconvenience, loss and damage referred to in the statement of claim all arose from the failure of the corporation to discharge the statutory duty referred to in para. 2 of the claim [i.e., the duty to repair all sewers vested in them and to prevent such sewers from becoming in such a state as to be a nuisance and to manage such sewers with proper diligence.]

The reference to a period of 23 years is explained in the following quotation from para. 7 of the defence:

> Certain storm-water or surface-water drains within the township of Madeley which is situated in the said borough discharge and have at all material dates discharged into the watercourse, but the nearest of such drains to the entrance of the said culvert is about 315 yds. above the same. Such drains have existed for at least 23 years and all or some of these were made by the local authority of which the corporation are the successors. The corporation admit that in the case of about 20 houses sewage therefrom has been and is discharged into such surface-water drains, but this has been done for upwards of 23 years and the corporation say that there were and are prescriptive rights vested in the owners of the said houses so discharging sewage to continue so to do and the corporation could not and cannot prevent such discharge. The corporation also admit that 44 further houses were erected in the said township between the years 1925 and 1929 pursuant to the Housing Acts and that the sewage from these houses has since then been and is discharged into pre-existing main water surface drains and through such drains or ditches in conjunction with surface-water into the watercourse at a point about 315 yds. above the mouth of the said culvert.

The foregoing quotations sufficiently indicate the nature of the questions of fact to which the plaintiffs were addressing their evidence when the investigation was arrested to await the decision of the point of law which had emerged. The judge was no doubt influenced, in isolating this point of law, by mercy for the parties, as it was obvious that, if the correct answer to the question were in the negative, it would be idle for the parties to spend time and money in investigating the extent to which the culvert had been used for conveying sewage.

CROSSMAN, J., holding that the point was not covered by any of the numerous authorities cited to him, decided it in favour of the plaintiffs, and granted a declaration that the change of status claimed to have taken place from a natural stream to a sewer within the meaning of the Public Health Act, 1875, was possible in law. This judgment was reversed by the Court of Appeal, where the view was expressed that the matter was concluded in favour of the defendants by the authority of the case of *Airdrie Magistrates* v. *Lanark County Council* (1) in this House.

My Lords, the channel in question when the Public Health Act of 1875 was passed was admittedly not a sewer within the meaning of that Act, and therefore did not then vest in the local authority under sect. 13. It was then a natural stream or watercourse within the meaning of sect. 17, which provided that nothing in the Act should authorise a local authority to make or use any sewer for conveying sewage into any natural stream or watercourse until such sewage had been rendered innocuous to the purity or quality of the water in such stream or watercourse. Equally, when the Rivers Pollution Prevention Act, 1876, was A passed, the channel was the channel of a "stream" within the meaning of sect. 20 of that Act, and the stream then became entitled to the protection of sect. 3, which constitutes it a statutory offence for any person to cause to fall or flow any solid or liquid sewage-matter into any stream. The change of legal status (if such there could be) from natural stream B to sewer is alleged to have been the result of the discharge of sewage into the stream since 1876. Such discharge of sewage into the stream cannot have been otherwise than in contravention of the Act of 1876, and therefore illegal. Hence arises the question of law, as it was more explicitly and precisely reformulated by the parties in the joint case C which they presented to this House :

> Whether it is in law possible for the status of a natural stream to be changed to that of a sewer by the discharge of sewage into it after the coming into operation of the Rivers Pollution Prevention Act, 1876.

The question whether a natural stream can ever in law become a sewer D by reason of an artificial change in the character of its flow, apart from any question of illegality, was very fully explored by counsel for the appellants, and in this connection it has to be remembered that a channel may be a sewer though it may carry no sewage and though its contents consist solely of innocuous surface drainage. The Public Health Act, E 1875, s. 13, vests not only then existing but also future sewers in the local authority, and there are several cases where it has been stated to be a question of degree whether a natural stream has become in law a sewer, notably *Falconar* v. *South Shields Corporation* (2) and *Newcastle-upon-Tyne Corporation* v. *Houseman* (3). But in these cases the legality F of the discharge of sewage into the stream, which it was contended had brought about the change in its legal status, was not in question. They are therefore not in point, and it is not necessary for your Lordships to express any opinion as to their soundness. In *West Riding of Yorkshire Rivers Board* v. *Gaunt (Reuben) & Sons, Ltd.* (4), on the other hand, G LORD ALVERSTONE, L.C.J., expressly said, at p. 185 :

> Further, we think that after the passing of the Acts of 1861, 1875 and 1876 the local authority could not merely by the illegal act of discharging sewage into a watercourse make that watercourse a sewer.

It should be explained that the Act of 1861 mentioned by LORD H ALVERSTONE, L.C.J., was the Local Government, 1858, Amendment Act, 1861, sect. 4 of which was the precursor of the Public Health Act, 1875, s. 17.

Prima facie it would seem remarkable if it were possible to legalise the pollution of streams by contravening an Act designed to prevent their pollution. In the case of a sewer vested in the local authority, the owners of adjoining property are entitled to discharge their sewage into it, so that, on this argument, if a natural stream in consequence of illegal pollution becomes in fact sufficiently foul to merit the legal appellation of a sewer, and so to vest in the local authority, the further pollution of it ceases to be an offence, and becomes a right. When the magistrates of Airdrie and of Coatbridge had the temerity to advance in this House the contention that they were entitled to continue to pollute with sewage certain streams within their boundaries because they had for a long time been polluting them, in despite of the Act of 1876, to such an extent that the streams had to all practical intents and purposes become sewers, it is not surprising that the contention received short shrift: *Airdrie Magistrates* v. *Lanark County Council* (1). I propose to examine this case in some detail. The proceedings began with the presentation in the Sheriff Court of Lanarkshire of two petitions by the Lanarkshire County Council, one against the local authority of the burgh of Airdrie and the other against the local authority of the burgh of Coatbridge, complaining that they had committed offences against the Rivers Pollution Prevention Act, 1876, by discharging sewage into certain burns within the burghs, and craving an order on the defenders to abstain from doing so. The county authority was concerned in the matter because, after leaving the boundaries of the burghs, the polluted burns on their way to the Clyde passed through various parishes within one of the districts of the county. Each of the defenders lodged along with their defences an elaborate statement of facts, in justification or excuse of their actings. These statements were on very similar lines, and I shall quote from the *Airdrie* case (1), which was treated as the leading case. The allegation of the Airdrie local authority was that the streams in question:

> had for many years before the passing of the Rivers Pollution Prevention Act, 1876, ceased to have any existence as streams carrying off mere surface-water and had become channels for conveying sewage.

They pleaded, *inter alia*, that the burns having for more than the prescriptive period before the passing of the Act of 1876:

> been used as channels for the conveying and purification of sewage must be held to be outwith the definition of a stream in the said Act.

It is unnecessary to detail all the procedure which took place. For the present purpose, it is enough to say that, by interlocutor of June 4, 1909, on a special case stated in the course of the proceedings, the First Division of the Court of Session found (i) that the sheriff-substitute and the sheriff had rightly held that the burns were polluted with sewage within the burgh boundaries; (ii) that the defenders were guilty of an offence against sect. 3 of the Act of 1876; and (iii) that the sheriff-substitute and the sheriff had rightly repelled all but one of the pleas of the defenders, the exception being a plea to the effect that there were no means practicable and available by which the defenders could render the sewage less harmful, this plea being reserved for further consideration.

It is to be observed that the defenders carefully refrained from alleging or pleading that the burns in question had become sewers in law. They did not contend that as sewers the burns had vested in them under the Burgh Police (Scotland) Act, 1892, s. 215, and that they were A accordingly entitled in virtue of that Act to use them as sewers. In the supplementary statement annexed to their printed case in this House, the defenders expressly disclaimed that the streams had vested in them. They said :

> What is vested in the sanitary authority is not in any true sense the burn or B channel of the burn but only a limited right in it.

It was thus not claimed that the burns were sewers within the meaning of the Burgh Police Act. It was plain (and had been held) that they did not fall within the exception in the definition of "stream" in sect. 20 of the Rivers Pollution Prevention Act which excepts "watercourses C at the passing of this Act mainly used as sewers and emptying directly into the sea or tidal waters," for, even if they had been mainly used as sewers, they did not empty directly into the sea or tidal waters. It therefore followed that they were streams entitled to the protection of sect. 3 of the Act of 1876. There is no such hybrid known to the law D as a watercourse into which, as a sewer, sewage may legitimately be discharged and into which, as a stream, sewage may not be discharged. Nevertheless, in this House the Airdrie local authority argued that the burns in question were not streams but sewers, and asked to be allowed to prove their allegations as to the use to which the burns had been put. E The position was an impossible one, for, while they sought to be allowed to prove that the burns had in fact become sewers, they disclaimed that the burns had in law vested in them as sewers. Having pointed out that the burns were clearly within the definition of streams in the Act of 1876, Lord Loreburn, L.C., proceeded as follows, at p. 291 : F

> But what the appellants say is this : Permit us to prove that these burns are sewers and if we can prove that they are sewers surely it cannot be an offence to pour sewage matter into the sewers. My Lords, that is merely asking leave to prove that they have with or without the contribution of others committed in an aggravated degree the very offence with which they are charged.

G

My Lords, the application of the *Airdrie* case (1) to the present case is obvious. Here your Lordships have to deal with the case of a watercourse which was admittedly a "stream" at the time of the passing of the Rivers Pollution Prevention Act, 1876, and entitled to be protected against the discharge of sewage into it. Nevertheless, it is sought H to prove that what was in law a protected stream has become in law an unprotected sewer, simply by reason of infringements of the law designed for its protection. Now, that is what your Lordships' House in effect held in the *Airdrie* case (1) to be a legal impossibility. The answer to the question posed ought, therefore, in my opinion, to be in the negative.

I should add that the attention of your Lordships was drawn to some cases in which it was held that the failure to observe certain statutory requirements in the construction of a sewer, or in effecting connections with it, did not prevent a drain from becoming in law a sewer, e.g., *St. Matthew, Bethnal Green, Vestry* v. *London School Board* (5). But A these cases are in an entirely different region of the law. There was no question in these cases of the conversion of a natural stream into a sewer, but only a question of whether what would otherwise answer the legal definition of a sewer was not in law a sewer because of the disregard of certain statutory formalities in procedure. I am accordingly of opinion B that the answer of the Court of Appeal to the question was right, and I move your Lordships to affirm their judgment, and to dismiss the appeal with costs.

LORD RUSSELL OF KILLOWEN: My Lords, I am in agreement with C the opinion of my noble and learned friend LORD MACMILLAN, and also with the opinion of my noble and learned friend LORD MAUGHAM, which I am about to read.

LORD MAUGHAM [read by LORD RUSSELL OF KILLOWEN]: My Lords, this appeal has raised questions of considerable public importance, D and the arguments which have been presented to us have ranged over several topics, each of which has called for the citation of a number of authorities, by no means easy, in all cases, to reconcile, and, in some cases, to understand. It is, however, agreed that the actual point which falls for decision lies within a very narrow compass, and I think that E all your Lordships concur in thinking that that point can properly be decided without travelling into legal regions beset with dangers and not yet fully explored.

The question of law submitted to the court requires us to assume that a certain watercourse (using the term for the present in a neutral F sense) running through land of the appellants known as Blests Hill, Madeley, in the borough of Wenlock, at the date when the Rivers Pollution Prevention Act, 1876, came into force, and for some years thereafter, was a natural stream. In effect we are asked to determine whether the discharge of house-sewage since that date from a large G number of houses within the township of Madeley has had the result of changing the status of the watercourse from a natural stream to a sewer, within the meaning of the Public Health Act, 1875. It should be added that the watercourse has for some time run in a culvert, and that some, if not all, of the connections of the drains into the watercourse have H been made by the respondents. But these additional circumstances will not be material unless the appellants can succeed on their main contention that, whatever the past history of the watercourse may be, and however pure its origin, the only matter to be considered is one of present fact, and, if it is in substance now being used as a sewer, it must in law be a sewer, within the meaning of the Public Health Act, 1875.

My Lords, as was pointed out by counsel for the respondents, the Public Health Act, 1875, contains no definition of the word "sewer." All we are told is that the word does not include "drains" as defined, nor drains vested in, or under the control of, any highway authority not being a local authority under the Act. It is to be noted that sect. 17, stating its effect very shortly, precludes the local authority from conveying unpurified sewage or any filthy water into any natural stream or watercourse, but, apart from this, it is manifest that a natural stream or its bed is not, generally speaking, a sewer. It is important at the outset to bear in mind—as was pointed out in the course of the argument by Lord Atkin—that "sewer" is the name given to a channel of some kind for sewage and certain liquids, and the proposition that a natural stream has become a sewer can mean only that the bed and banks of what was once a natural stream have become a legal channel for sewage. Now, under the Public Health Act, 1875, sewers, with certain exceptions, which need not be stated for the present purposes, are vested in, and are under the control of, the local authority (sect. 13). That body must keep them in repair (sect. 15). It is given wide powers of enlarging them, of covering them up, of altering their course, and even of closing them up (sect. 18). Moreover, owners and occupiers within the district are entitled to drain into these sewers (sect. 21). It would be more than ridiculous to suppose that the Act had given to the local authorities these extensive powers over the banks and beds of all the rivers and streams within their areas, from the Thames and the Clyde downwards, subject only to proof that such rivers and streams had been and were being used to carry away rainwater or sewage or other clean or foul liquids from a number of premises. That would have been true in 1875 of nearly every river or stream running through every town in Great Britain. It is clear, I think, that, generally speaking, the beds and banks of natural rivers and streams are not sewers within the term as used in the Act. Apart from sect. 17, it should be observed that the Act does not contemplate that the local authorities will have an unrestricted right of pouring even a pure effluent or clean rainwater into a natural stream, since there is a general saving clause for water rights (sect. 332), which provides that nothing in the Act is, *inter alia*, to authorise a local authority injuriously to affect any river or stream or their feeders in cases where there would be, if the Act had not been passed, a right in any person to prevent it, unless with his consent in writing.

My Lords, to prevent misconception I will add that no doubt there are circumstances in which the bed and banks of what was once a natural stream might, prior to the Act of 1875, have become substantially nothing but a channel for sewage. There are cases in which it has been held that such a channel has become a sewer within the meaning of the Act, vesting in the local authority. *Falconar* v. *South Shields Corporation* (2) can be explained as a decision of the Court of Appeal only in that sense, and there are other authorities supporting the same proposition. I do not wish to express any doubt in reference to these cases. The problem with which we are dealing is not concerned with them.

The Public Health Act, 1875, received the Royal Assent on Aug. 11, 1875, and it was quickly followed by the Rivers Pollution Prevention Act, 1876. By sect. 3 of this Act it was made an offence to cause to A fall or flow or to be carried into any "stream" any solid or liquid sewage. There is an exception when this is done by means of a channel used, constructed, or in course of construction, on Aug. 15, 1876, for the purpose of conveying sewage-matter, and when the local authority carrying and knowingly permitting the sewage so to fall or flow proves that it is B using the best practicable and available means of rendering the sewage harmless. The exception has little to do with the present case, except that it indicates that it is an offence to make a channel or to use a new channel after Aug. 15, 1876, for the purpose of conveying sewage-matter into a stream, even if the authority is using the best practicable and C available means of rendering the sewage harmless. It should here be observed that the Public Health Act, 1875, s. 17 (above referred to) appears by inference to permit the local authority to convey sewage or filthy matter into, *inter alia*, a natural stream if it has been so treated that the purity and quality of the water in the stream will not be affected D or deteriorated: *A.-G.* v. *Birmingham, Tame & Rea District Drainage Board* (6). Sect. 3 of the Rivers Pollution Prevention Act, however, contains no similar implication, except as regards channels used, constructed, or in course of construction in 1876. The word "stream" is defined—not, I think, very happily—in sect. 20 of the Act. It includes E the sea to such extent, and tidal waters to such point, as may be determined by the local government board. Subject to that saving, it includes:

> rivers, streams, canals, lakes, and watercourses other than watercourses at the passing of this Act mainly used as sewers and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid.

F

Two things seem to me to be indisputable. First, sect. 3 makes it an offence for any local authority to pour solid or liquid sewage into any natural stream; and the use of the best practicable means of rendering the sewage-matter harmless will not avail unless the channel G conveying the sewage to the stream was used, constructed, or in process of construction on Aug. 15, 1876. Secondly, the definition excepts:

> watercourses [at the date of the Act] mainly used as sewers and emptying directly into the sea, or tidal waters which have not been determined to be streams . . .

I emphasise the word "mainly," because it is evident from it that H watercourses in 1876 used to a considerable extent as sewers are yet to be deemed streams even if they empty directly into the sea or the tidal waters mentioned; and, further, watercourses which do not directly empty into the sea or the tidal waters are still "streams" within the Act, even if they are mainly used as sewers. The implied prohibition in sect. 3 (as in sects. 2 and 4) is obviously not limited to pure, nor even to substantially pure, "streams." It extends to streams which, at the date of the Act, were being polluted to a serious extent.

There remains, then, in the present case, the question of whether a stream at the date of the Act of 1876 within the meaning of that Act can be so altered by repeated offences against that Act—and in particular by the repeated pouring of crude sewage into it—that it ceases to be a A
stream, and that, as a consequence, its channel becomes a "sewer," with all the necessary consequences. There must, if the question is answered in the affirmative, be a moment of time at which that which was previously unlawful becomes, by one more unlawful act, something which not only is justifiable, but which also causes the property of a B
number of private persons to vest in the local authority. It was contended that under the Public Health Act, 1875, s. 308, these private persons would be entitled to compensation. But there is this serious difficulty about the contention, that the section is in clear language confined to damage by reason of the exercise of any of the powers of C
the Act, and that would not be the case where the local authority were acting without any such power, and in defiance of an Act of Parliament.

There is another observation to be made before coming to the actual question. The Rivers Pollution Prevention Act, 1876, was unquestionably passed in the public interest. Riparian owners before that Act might D
certainly have obtained injunctions to restrain pollution if they could establish that the defendant was responsible for it, but actions of this kind are always costly, and generally uncertain in their result, unless it is clear that the defendant is the only person to blame. If the pollution is dangerous to health, no doubt it amounts to an indictable nuisance, E
and a civil action in the name of the Attorney-General will lie. These remedies, however, had proved insufficient in many districts to prevent very serious pollution of the rivers and streams of Great Britain and Ireland. The preamble to the Act was in these terms:

> Whereas it is expedient to make further provision for the prevention of the pollution of rivers, and in particular to prevent the establishment of new sources of pollution. F

There can, I think, be no doubt that the provisions of the Act were intended to stop pollutions of different kinds, not in the interest of individuals, or classes of persons, but in the interest of the public. G

My Lords, there are certainly statutes imposing duties or prohibitions which can be waived. As the Earl of Selborne, L.C., pointed out in *Goldsmid* v. *Great Eastern Railway Co.* (7), at p. 936, *unusquisque potest renunciare juri pro se introducto*. There are also cases where, by the doctrine of a lost grant or lost patent, or by some similar presumption, individuals H
have, notwithstanding the terms of a statute, acquired rights apparently in contradiction of it. There is, however, no case in the books in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrongdoer. Such a contention is, indeed, quite untenable. The present appeal,

in my judgment, and, I think, in that of all your Lordships, would therefore be bound to fail, quite apart from the authority of this House in *Airdrie Magistrates* v. *Lanark County Council* (1), in reliance on which the Court of Appeal decided the case.

My Lords, the careful examination of that authority in the opinion A of my noble and learned friend LORD MACMILLAN removes all doubt as to what was actually decided by the House, and makes it unnecessary for me to add anything on that question. To my mind, since the judgment of the House in that case, it is impossible to doubt two propositions, and for myself I do not think they were in doubt before: (i) streams B within the meaning of the Rivers Pollution Prevention Act and their beds and banks are not and cannot at the same time be sewers within the meaning of that term in the Public Health Act, 1875; (ii) to commit the offence under the Act of 1876 of pouring sewage into such a stream, even in an aggravated degree, does not convert the stream into a sewer C within the Act of 1875. Perhaps I may add that, as long ago as 1902, in *West Riding of Yorkshire Rivers Board* v. *Yorkshire Indigo, Scarlet & Colour Dyers, Ltd.* (8), at p. 81, that eminent judge CHANNELL, J., in an interlocutory remark, put the exact point in the form of a question, which was answered by the judgment in the affirmative:

D
> Must you not show that the sewage got into what was formerly a natural stream by some lawful authority, or, if not, that . . . at the date of the Act of Parliament about rivers pollution, it had already become a recognised sewer?

He added that, unless one of these two things was proved, it was only a strong case of the particular evil which the Rivers Pollution Prevention E Act was meant to meet. This was putting the case in a nutshell, from which it may be hoped that it has, on the present appeal, emerged for the last time. For these reasons, I think that the judgment of the Court of Appeal was perfectly correct, and that the appeal must be dismissed.

F LORD ATKIN: My Lords, I am requested by my noble and learned friend LORD ROCHE to say that he concurs in the opinion of LORD MACMILLAN, which I have already read.

Appeal dismissed with costs.

Solicitors: *Ford, Harris & Co.*, agents for *Leonard Gocher*, Birmingham G (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Frederick W. Derry*, Town Clerk, Wenlock, Salop (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. *v.* SHARPE, R. *v.* STRINGER.

[Court of Criminal Appeal (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **December 20, 1937.**]

Criminal Law—Obstructing course of justice—Concealment of motor accident—False story told to police—Persuading others to corroborate false statements—No pending proceedings at the time when acts done.

One of the prisoners, when motoring, having knocked down and injured a cyclist, the two prisoners agreed to tell a story which would disprove any charge that the car in question was concerned in the accident. They maintained this story upon police investigations, and induced one other person to make statements corroborative of the invented story. The prisoners were indicted for conspiring together and with other persons to defeat the ends of public justice by concealing and destroying evidence, by attempting to suborn a third person to give perjured evidence supporting the concealment, and by attempting to mislead the police officers then investigating the crime by statements known to be untrue. The indictment was subsequently amended by altering the charge of attempting to suborn a third party to give perjured evidence to a charge of persuading that party to make an untrue statement. It was contended that the indictment disclosed no offence known to the law, as at the time of the alleged conspiracy there were no proceedings pending in respect of the accident :—

Held : it is not necessary, where the offence of conspiring to obstruct the course of public justice is charged against any person or persons, that proceedings should have already been commenced at the time when the concealment of the crime or the conspiracy with others to conceal it or prevent its prosecution takes place.

[**EDITORIAL NOTE.** It was argued in this case that the conspiracy to stifle a prosecution or to obstruct the course of public justice was a crime only when there were pending proceedings at the time of the conspiracy, with the result that acts charged to have been done before the commencement of the prosecution could not amount to that crime. This argument was rejected by the court, since public justice requires that every attempt to conceal a crime shall be punishable.

As to Conspiracy to Obstruct the Course of Justice, see HALSBURY, Hailsham Edn., Vol. 9, pp. 351, 352, para. 574 ; and for Cases, see DIGEST, Vol. 15, pp. 698, 699, Nos. 7528-7548.]

Appeal from a conviction by Charles, J., on Dec. 6, 1937, at the Lewes Assizes. The matter first came before the magistrates at Chichester, when they refused to commit the prisoners for trial. An application was then made to the judge in chambers to prefer a voluntary bill of indictment, and this application was granted. The indictment is set out in the judgment. The following is a short statement of the material facts. On Saturday, Aug. 28, 1937, Stringer and Sharpe, with a party of friends, went to a dance at Bracklesham. The party set off in a procession of cars, Sharpe, who knew the way, being in the lead, while Stringer, a stranger to the neighbourhood, followed. Stringer's car was in part painted red. On arrival at Bracklesham Stringer said : "The hood-cover has come off the hood. I think we have hit something." He then called Sharpe aside, and the two had a conversation which was watched, but which was not overheard, and during which they obviously agreed to deny the occurrence of the accident. In fact,

Stringer's car had struck and injured a cyclist, and damage had been done to the hood of the car, to the front mudguard, and to the side-lamp. They then returned by a route admittedly deliberately devised to avoid going back past the scene of the accident. In other words, Sharpe agreed to pilot Stringer, the man he knew to have committed
A this offence, by some other route than that which would take them past the scene of the accident. They parted and Sharpe turned his car and went back to the scene of the accident. There was an ambulance there and a large number of helpers, but, when his offer to help was refused, he said nothing about the fact that he knew who had committed the
B offence, if any, and went on back to Bracklesham. In a conversation there with two other members of the party, Sharpe, without referring in detail to the accident, asked the others to say nothing about it.

The police had found upon the bicycle evidence of red enamel, and on Monday, Aug. 30, they took a sample of the red enamel from Stringer's
C car. At 3.30 that afternoon Stringer bought a tin of black paint, but the police, hearing of this, stopped him when he was driving his car, and found a tin of black paint on the floor of the car. On being questioned, Stringer, who was trembling violently, proceeded to make a purported explanation which he later admitted to be quite untrue. Among the
D things about which he was questioned was the presence of new bolts on the wing lamps. Stringer admitted that the bolts were new, and said that he had had them from a carpenter, whose name he did not know, on a nearby estate. This statement was quite untrue. The next morning, Tuesday, Aug. 31, Stringer went to Osborn, the carpenter in
E question, and told him to say that he had provided the bolts. Osborn told the agreed lie to the police, but later, when the police interviewed Stringer in the presence of Osborn, admitted the falsity of his statement. Sharpe made a statement generally corroborative of Stringer's statement, but, overhearing a statement by the inspector referring to the lamp on
F Stringer's car which had been damaged, he, after some persuasion by the police, took them to his house and produced the damaged lamp. Both prisoners then made statements that were substantially true.

At the trial, counsel for Stringer moved to quash the indictment on three grounds, (*a*) that all the facts were not before the judge when he
G gave leave for the bill of indictment to be preferred, (*b*) that the rules under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2, were not strictly complied with by the application or the bill, (*c*) that the indictment disclosed no offence known to the law. CHARLES, J., overruled these objections to the indictment, and held that,
H where the application to be allowed to prefer a voluntary bill of indictment, there being no depositions, is accompanied by proofs of proposed witnesses, verified by an affidavit by the person responsible for the preparation of the proofs, it is sufficient. Upon the question that the indictment disclosed no offence known to the law, he held that the indictment disclosed the offence of a criminal conspiracy. He further

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held that the crime of attempting to obstruct or to stifle proceedings was not dependent upon there being proceedings then pending. It was sufficient that, before a prosecution was started, things and matters were done which would result in the stifling and stopping of any such prosecution, and make it impossible that such a prosecution could be successfully terminated. The indictment, he held, disclosed a conspiracy to defeat the ends of public justice.

H. J. Brown for the appellant Sharpe.

P. A. T. H. Harmsworth for the appellant Stringer.

Christmas Humphreys for the Crown.

DU PARCQ, J. [delivering the judgment of the court]: These appellants, Percy Ogden Sharpe and Reginald Audley Stringer, pleaded guilty before CHARLES, J., at the Lewes Assizes to an indictment charging them, to put it quite shortly, with conspiracy to defeat the ends of justice. Sharpe was sentenced to 3 months, Stringer was sentenced to 4 months, both in the second division. They now appeal against conviction.

Before the judge there was a long argument about the indictment. What had happened was that, when the case came before the justices, they were persuaded that the offence with which these men were charged was not one which was known to the law. After the justices had refused to commit, the matter came before a judge, and, as it happened, it came before the judge who ultimately tried the case, CHARLES, . An application was made to him to prefer a voluntary bill, and, as there were no depositions, the application was accompanied by proofs of the proposed evidence, in compliance with the rules. It may be said that the same point was made before the judge at the trial, that the application was not in proper form because it did not state that, to the best of the knowledge, information and belief of the applicant, it was substantially a true case against the defendants. CHARLES, J., decided that there was nothing in that point, on the ground that the affidavit contained all the necessary information. We agree that there is nothing in that point. In such a case as this, this court would not be prepared to go behind a case after a judge had exercised his discretion

The indictment which came before the judge was in these words.

> Conspiracy to defeat the ends of justice: Reginald Audley Stringer and Percy Ogden Sharpe between Aug. 28, 1937, and Sept. 3, 1937, in the county of Sussex, conspired together and with Alfred John Osborn and with other persons unknown to defeat the ends of public justice by concealing and destroying evidence of the commission of a crime by attempting to suborn the said Alfred John Osborn to give perjured evidence in accordance with the said concealment, and by attempting to mislead police officers then investigating the said crime by statements which they knew to be untrue.

There was a lengthy argument before the judge as to whether that indictment disclosed any offence known to the law The judge decided that it did, and, after that argument and that decision, the defendants pleaded guilty to an amended indictment. The indictment was amended

by substituting the word "persuading" for "attempting to suborn,"
and the words "to make an untrue statement in accordance with the
said concealment" for the words "to give perjured evidence."

The question which now comes before this court is whether that indict-
ment, so amended, disclosed an offence known to the law. If it did not,
A then no doubt the appellants, though they pleaded guilty, might be
entitled to have their convictions quashed. But, if it does disclose an
offence known to the law, then they must stand by their pleas of guilty,
and, in that event, it must be known that they committed the offence.
The question for this court, therefore, is whether persons who conspire
B to destroy evidence of the commission of a crime, and get persons to
conceal a crime, and attempt to mislead a police officer, are guilty of the
indictable offence of conspiracy. In the view of this court, there can
be no doubt that they are so guilty.

It is not disputed that there is an offence of conspiracy to obstruct
C the course of public justice. That offence is laid down by the legislature
under the Criminal Procedure Act, 1851, s. 29. All that is left, there-
fore, of the argument to the judge, with which this court has fully
acquainted itself, is that there can be no offence of conspiracy to prevent
the course of public justice unless proceedings are pending or have
D commenced. In other words, a crime has not been committed by a
person who conspires with others to help him to conceal what has taken
place, and persuades other persons to make untrue statements, unless
proceedings have already begun. That seems to this court to be a
hopeless proposition, and so absurd that it does not form a part of the
E law of this country.

Public justice requires not only that people should not take steps to
avoid the concealment of a crime, or destroy evidence once a summons
has been served upon somebody, but also that every crime should be
suitably dealt with, and a man who obstructs public justice as soon as
F a crime is committed, and endeavours to avoid the consequences of his
wrongdoing by conspiracy with others, is just as much guilty of an
offence if he waits until after proceedings are actually pending. It is
impossible to say more on a matter which can be said in a few sentences.
It is desirable to say only that there is nothing whatever in the con-
G tention put forward in the argument addressed to this court. The
appeal is dismissed.

Harmsworth then made an application that the time the appellants
had served as appellants should count as part of their sentences, in view
of the fact that the judge at the trial had intimated that it was desirable
H to have a ruling by the Court of Criminal Appeal, though he did not grant
a certificate.

Lord Hewart, L.C.J.: We must have one weight and one measure in
this court, and clearly the time ought not to count. However, having
regard to the expression on the part of the judge, an exception can be

made here, and we will treat the matter as if a certificate had been asked for and had been granted. That being so, the time during which these appellants have been treated in custody as appellants will count as part of their sentences.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellants); *Walmsley & Stansbury*, agents for *J. E. Dell & Loader*, Shoreham, Sussex (for the Crown).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

MERCANTILE BANK OF INDIA, LTD. *v.* CENTRAL BANK OF INDIA, LTD.

Applied. Jerome *v.* Bentley & Co. [1952] 2 All E.R. 114.

[Privy Council (Lord Wright, Sir George Lowndes, Sir George Rankin), **October 28, 29, December 3, 1937.**]

Privy Council—India—Estoppel—By representation—Bankers' loan to merchants—Secured by pledge of railway receipts for a consignment of goods—Receipts returned to merchants for specific purpose of clearing and storing goods in bank's premises—Further advance fraudulently obtained from second bank by subsequent pledge of the same receipts—Goods disposed of—Claim for conversion.

The appellant and respondent banks were in the habit of making loans to merchants on the security of goods consigned to them, the practice being that the merchant should deliver to the bank the several railway receipts covering the consignment, and should give at the same time a promissory note for the amount advanced, and a letter of lien. The bank would then pass the railway receipts on to their own go-down keeper, so as to enable him to obtain possession of the goods. In practice, the bank's go-down keeper, in order to avail himself of the merchant's services, would hand the railway receipts back to the merchants, for the specific purpose of clearing the goods and storing them in the bank's go-down. A firm of merchants carrying on business as buyers and exporters of ground nuts obtained a loan from the respondent bank upon the security of a consignment of ground nuts, and, on the return to them of the railway receipts, in accordance with the usual practice, fraudulently obtained a second advance from the appellant bank—who were unaware of the pledge to the respondent bank—upon the security of the same goods by pledging the same railway receipts with them. In some cases the railway receipts had been stamped with the respondent bank's stamp, but in general the respondent bank had omitted to do so. When subsequently the merchants were declared insolvent, the respondents brought an action against the appellants for conversion of the goods the subject-matter of the railway receipts:—

Held: (i) the respondents were not estopped, by their conduct in returning the receipts to the merchants, from setting up their title to the goods as against the appellants. They had not committed any breach of duty owing either to the appellants or to anyone else. They had no reason to think that the documents would ever be handed to the appellants. All that they did was to deal with their own property, as pledgees, in the usual course of business, which was well known to, and had been followed by, both the appellants and the respondents. No authority had been given to the merchants to deal with the goods otherwise than by handling them for the limited purpose of clearance, and it was impossible to say that the respondents made any representation to the appellants that the merchants had authority, or were entitled, to obtain an advance on the goods for themselves.

(ii) the omission to place the bank's stamp upon the receipts did not create any liability because there was no duty as between the appellants and the respondents to stamp the receipts.

Commonwealth Trust v. *Akotey* (3) *not followed.*

[**EDITORIAL NOTE.** It was here argued that the necessity to show a duty in order to constitute an estoppel applied to cases of estoppel by negligence only and not generally to estoppel by representation. This, however, is held not to be the case, and it is in general necessary when reliance is placed upon an estoppel by representation to show a breach of duty by the party said to be estopped.

AS TO ESTOPPEL BY REPRESENTATION, see HALSBURY, Hailsham Edn., Vol. 13, pp. 470-482, paras. 537-550; and FOR CASES, see DIGEST, Vol. 21, pp. 290-310, Nos. 1032-1139.]

Cases referred to:

(1) *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.*, [1935] A.C. 53; Digest Supp.; 104 L.J.P.C. 1; 152 L.T. 170.

(2) *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63; 39 Digest 614, *2115*; *on appeal* (1790), 1 Hy. Bl. 357; *subsequent proceedings* (1794), 5 Term Rep. 683.

(3) *Commonwealth Trust* v. *Akotey*, [1926] A.C. 72; 39 Digest 636, *2322*; 94 L.J.P.C. 167; 134 L.T. 33.

(4) *Jones (R. E.), Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A.C. 670; Digest Supp.; 95 L.J.K.B. 913; 135 L.T. 548.

(5) *Farquharson Brothers & Co.* v. *King & Co.*, [1902] A.C. 325; 21 Digest 289, *1021*; 71 L.J.K.B. 667; 86 L.T. 810.

(6) *London Joint Stock Bank, Ltd.* v. *MacMillan & Arthur*, [1918] A.C. 777; 3 Digest 76, *159*; 119 L.T. 387.

(7) *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175; 21 Digest 291, *1036*; 32 L.J. Ex. 273.

(8) *Johnson* v. *Crédit Lyonnais Co.*, *Johnson* v. *Blumenthal* (1877), 3 C.P.D. 32; 21 Digest 399, *1599*; 47 L.J.Q.B. 241; 37 L.T. 657.

(9) *Scholfield* v. *Londesborough (Earl)*, [1896] A.C. 514; 6 Digest 384, *2518*; 65 L.J.Q.B. 593; 75 L.T. 254.

(10) *Slingsby* v. *District Bank, Ltd.*, [1932] 1 K.B. 544; Digest Supp.; 101 L.J.K.B. 281; 146 L.T. 377.

(11) *Henderson & Co.* v. *Williams*, [1895] 1 Q.B. 521; 21 Digest 365, *1425*; 64 L.J.Q.B. 308; 72 L.T. 98.

(12) *Fuller* v. *Glyn, Mills, Currie & Co.*, [1914] 2 K.B. 168; 6 Digest 453, *2892*; 83 L.J.K.B. 764; 110 L.T. 318.

(13) *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201; 6 Digest 139, *917*; 61 L.J. Ch. 723; 66 L.T. 625; *revsg.* S.C., [1891] 1 Ch. 270.

(14) *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892), L.R. 19 Ind. App. 203; 21 Digest 300, case *1082 iv.*

(15) *Boyson* v. *Coles* (1817), 6 M. & S. 14; 1 Digest 342, *546*.

(16) *Dyer* v. *Pearson* (1824), 3 B. & C. 38; 1 Digest 373, *807*.

(17) *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. 354; 1 Digest 333, *477*; 44 L.J.C.P. 233; 32 L.T. 733.

(18) *Pease* v. *Gloahec, The Marie Joseph* (1866), L.R. 1 P.C. 219; 39 Digest 634, *2307*; 35 L.J.P.C. 66; 15 L.T. 6.

(19) *Colonial Bank* v. *Cady & Williams*, *London Chartered Bank of Australia* v. *Cady & Williams* (1890), 15 App. Cas. 267; 6 Digest 453, *2891*; 60 L.J.Ch. 131; 63 L.T. 27; *affg.* S.C. (1888), 38 Ch.D. 388.

(20) *Lloyds Bank, Ltd.* v. *Bank of America National Trust & Savings Association,* [1937] 2 K.B. 631; [1937] 3 All E.R. 312; Digest Supp.; 106 L.J.K.B. 897; 157 L.T. 38.

(21) *Reeves* v. *Capper* (1838), 5 Bing. N.C. 136; 21 Digest 503, *771*; 8 L.J.C.P. 44.

(22) *Heap* v. *Motorists Advisory Agency, Ltd.,* [1923] 1 K.B. 577; 39 Digest 531, *1441*; 92 L.J.K.B. 553; 129 L.T. 146. A

(23) *Weiner* v. *Gill, Same* v. *Smith,* [1905] 2 K.B. 172; 39 Digest 510, *1267*; 74 L.J.K.B. 845; 92 L.T. 843.

(24) *Fine Art Society, Ltd.* v. *Union Bank of London, Ltd.* (1886), 17 Q.B.D. 705; 3 Digest 213, *528*; 56 L.J.Q.B. 70; 55 L.T. 536.

APPEAL from a judgment of the High Court of Judicature at Madras, B Appellate Jurisdiction (SIR HORACE BEASLEY, C.J., CORNISH, J.), dated Jan. 24, 1935, dismissing the appellants' appeal from a judgment and decrees of the High Court in its original jurisdiction (STONE, J.), dated Aug. 9, 1932, and Nov. 15, 1932, respectively.

The facts of the case are set out in the judgment of their Lordships, C delivered by LORD WRIGHT.

A. T. Miller, K.C., and *C. P. Harvey*, for the appellants, referred to *Boyson* v. *Coles* (15), *Dyer* v. *Pearson* (16), *Cole* v. *North Western Bank* (17), *Pease* v. *Gloahec* (18), *Henderson & Co.* v. *Williams* (11), *Johnson* v. *Crédit Lyonnais Co.* (8), *Colonial Bank* v. *Cady & Williams* (19), *Fuller* D v. *Glyn, Mills, Currie & Co.* (12), *London Joint Stock Bank* v. *Simmons* (13), *R. E. Jones, Ltd.* v. *Waring & Gillow, Ltd.* (4), *Commonwealth Trust* v. *Akotey* (3), *Farquharson Brothers & Co.* v. *King & Co.* (5), *Sarat Chunder Dey* v. *Gopal Chunder Laha* (14).

Hon. Sir Stafford Cripps, K.C., and *W. Wallach*, for the respondents, re- E ferred to *Lloyds Bank, Ltd.* v. *Bank of America National Trust and Savings Association* (20), *Farquharson Brothers & Co.* v. *King & Co.* (5), *Reeves* v. *Capper* (21), *London Joint Stock Bank, Ltd.* v. *MacMillan & Arthur* (6), *Johnson* v. *Crédit Lyonnais Co.* (8), *Cole* v. *North Western Bank* (17), *Henderson & Co.* v. *Williams* (11), *Colonial Bank* v. *Cady & Williams* (19), F *Fuller* v. *Glyn, Mills, Currie & Co.* (12), *Heap* v. *Motorists Advisory Agency, Ltd.* (22), *Weiner* v. *Gill* (23), *Fine Art Society, Ltd.* v. *Union Bank of London, Ltd.* (24).

LORD WRIGHT: The appellants and the respondents are limited G companies carrying on the business of bankers in Madras. The appeal is against the judgment of the Appellate Court of Madras, who have held the appellants liable to the respondents for the conversion of their property. The question arises out of a series of frauds committed by a firm of merchants named C. K. Narayana Iyer & Sons, who will be H referred to hereinafter as "the merchants." They were a firm who, until the frauds became disclosed, had enjoyed the highest standing and repute in Madras, where they carried on a large business as buyers and exporters of ground nuts. Their practice was to purchase the ground nuts from the up-country growers and have them despatched by rail to

Madras. The railway companies and the Madras Port Trust, which had its own railway system within the port, had a working arrangement between them under which the Trust took over the consignment of nuts on their arrival at the port and lodged them, in the first instance, in their go-downs. The ground nuts were covered, in respect of each consignment or wagon-load, by a document called a "railway receipt," which contained particulars of the goods and the names of the consignor and consignee. In all the consignments in question in these proceedings, the merchants were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because, if they were not so named, the document had been indorsed by the named consignee. The railway receipts contained conditions to the effect that the railway receipt must be given up at destination by the consignee, failing which the railway might refuse to deliver, and that the signature of the consigneee or his agent in the delivery book at destination should be evidence of complete delivery. They also provided that, if the consignee did not himself attend to take delivery, he must indorse on the receipt a request for delivery to the person to whom he wished it to be made.

Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts. The practice was that the merchant should deliver to the bank the relevant railway receipts by way of pledge, at the same time giving to the bank a promissory note for the amount advanced, and a letter of lien. The bank would then pass on the railway receipts to their own go-down keeper, so as to enable him to obtain possession of the goods. What was in practice then done was that the bank's go-down keeper, in order to avail himself of the merchants' services, handed the railway receipts back to the merchants, but only for the specific purpose of clearing the goods from the Port Trust and storing them in the bank's go-down. The character and effect of this course of business were discussed by the Board in *Madras Official Assignee* v. *Mercantile Bank of India, Ltd.* (1). It was there held that the railway receipt was a document of title within the meaning of the Indian Contract Act, 1872, s. 178, and that a pledge of the railway receipt operated under that section (which was in force at material times but has since been repealed) as a pledge of the goods, though, by the general law, a pledge of documents is not *prima facie* deemed to be a pledge of the goods. It was also held by the Board in that case that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts, or by entrusting them to the merchants or their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the bank's go-down. It was said by the Board that such a procedure was in the usual course of business, and was obviously either necessary, or at least convenient, for the conduct of the business.

The railway receipts concerned in this case were 35 in number. The
merchants, in accordance with the practice, and for the purpose, described
above, were given the receipts by the respondents, and then fraudulently
obtained a second advance from the appellants. It was found that, in
Jan. and Feb., 1929, the merchants followed a systematic course of
fraud in their dealings with both the appellants and the respondents. A
After having obtained railway receipts from either the appellants or the
respondents, as the case might be, they repledged them with the other
bank. That is to say, if the railway receipts had been pledged in the
first instance with the appellants, they took them to the respondents,
and obtained advances on them as if they had not been already pledged ; B
and, conversely, if they had been first pledged with the respondents,
they took them to the appellants, and obtained advances from them.
There was, however, one difference between the two banks, in that the
practice of the appellants was to place their stamp on the railway receipt
when they took it by way of pledge. That practice was not adopted C
by the respondents until about the end of the period covered by the
fraudulent operations. The addition of the stamp had no effect in law,
and was not, it seems, generally adopted by banks, but it would naturally,
according to the evidence, put the other bank on inquiry. The
merchants, however, were not unequal to dealing with this complication. D
They followed the simple process of obtaining delivery of the goods, if
the railway receipts bore the bank's stamp, and thereupon pledging the
goods themselves with the other bank. It was rightly not contested
that such a pledge of the actual goods was invalid. In due course the
frauds became known, and the merchants were declared insolvent. E
Thereupon, the respondents brought against the appellants an action
for conversion, out of which the present appeal arises. It was found
by the trial judge, and it is not now contested, that the respondents,
having obtained a valid pledge of the goods from the merchants by the
pledge of the receipts, did not lose their rights as pledgees by what the F
merchants then did when they purported to pledge the goods with the
appellants. This followed from the Indian Contract Act, 1872, s. 178,
as interpreted in the *Madras Official Assignee* case (1). This section, in
force at material times, though since repealed, is in the following terms :

> A person who is in possession of any goods, or of any bill of lading, dock warrant, G
> warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for
> delivery, or any other document of title to goods, may make a valid pledge of such
> goods or documents ; Provided that the pawnee acts in good faith, and under
> circumstances which are not such as to raise a reasonable presumption that the
> pawnor is acting improperly ; Provided also that such goods or documents have
> not been obtained from the lawful owner, or from any person in lawful custody
> of them, by means of an offence or fraud.

H

It has been found in the courts below that the merchants obtained the documents or goods by means of an offence or fraud within the meaning of the section, because the true inference from the facts was that they obtained the documents with no intention of fulfilling their duty as mandatories, but with the dishonest intention of perpetrating the frauds which they actually committed. The correctness of that ruling was not challenged before the Board. The appellants, however, claimed that they were entitled to succeed in the action, on the ground which is set out in their amended defence in the following paragraph:

> A The plaintiff bank having placed C.K.N. & Sons in possession of the railway receipts without anything therein to indicate that the plaintiff bank had any interest therein or that C.K.N. & Sons were not the owners thereof, enabled C.K.N. & Sons to hold themselves out as the owners thereof and thereby to pledge the said railway receipts for value with the defendant bank, who acted in good faith, and the plaintiff bank is therefore estopped from setting up its title against that of the defendant bank to the relative goods or their value.

B It is this plea which has been the subject of debate in the present appeal. Both courts below have decided against it. It is admitted that the respondents made the advances completely *bona fide.* They only did what they had done for some time previously without any misadventure. They had regularly had dealings with the merchants, C over a prolonged period. The merchants were a firm of the highest standing and reputation, of whose rectitude and solvency there had been no question or suspicion. In delivering the railway receipts to the merchants, the respondents followed a practice which had long been consistently followed both by the appellants and by the respondents. D No authority had been given to the merchants to deal with the goods otherwise than by handling them for the limited purpose which has been stated. On these facts it would *prima facie* seem impossible to say that the respondents made any representation to the appellants that the merchants had authority, or were entitled, to obtain an advance on E the goods for themselves. There would appear to be no reason for saying that the respondents committed any breach of any duty owing either to the appellants or to anyone else. All that the respondents did was, it would seem, to deal with their own property, as pledgees, in the usual course of business, which was well known to, and had been F followed by, both the appellants and the respondents. It would seem, accordingly, that they were entitled to rely on the rule of law that no one could transfer a title better than that which he possessed, save in the exceptional cases not here material, such as sales in market overt, or where there has been a transfer of property avoidable on the ground G of fraud but not yet avoided, or where the special provisions of the Factors Acts apply. It has, however, been strenuously contended, on behalf of the appellants, that the circumstances here raise what is called an estoppel, and that the respondents are precluded by their conduct from denying, as against the appellants, that the merchants had the right, H which they pretended to have, of pledging the goods as owners, the *bona fides* of the appellants not being in question. The estoppel is relied on as giving to the appellants the substantive right of claiming a valid pledge of the goods, taking priority over the pledge to the respondents, since, though estoppel has been described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Of the many forms which estoppel may take, it is here necessary to refer to that type of estoppel only which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence, or by conduct, or by representation, or by a holding out of ostensible authority. The argument has been variously put on behalf of the appellants. They have claimed to succeed upon the broad rule stated by Ashhurst, J., in *Lickbarrow* v. *Mason* (2), at p. 70, that:

> wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

The decision of the Board in *Commonwealth Trust* v. *Akotey* (3) was cited as one in which it was said that the case was a plain case for the application of that principle. The facts were that a grower of cocoa in the Gold Coast Colony had by railway consigned cocoa to a merchant at the port, in the expectation of his buying the cocoa. The merchant, instead of concluding the purchase, purported to sell the cocoa as for himself to a third party, the appellants, who purchased in good faith, and paid the full price to the merchant as seller. In an action for conversion brought by the grower, the full court of the Gold Coast held that no property had passed, because the merchant had no title. That judgment was reversed by this Board, who said, at p. 76:

> To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow* v. *Mason* (2).

What is there stated, it may be, will cover this case, if it is applied without qualification, but, in their Lordships' judgment, it is impossible to accept without qualification as a true statement of law the principles there broadly laid down. It may well be that there were facts in that case not fully elucidated in the report which would justify the decision, but, on the face of it, their Lordships do not think that the case is one which it would be safe to follow. This was, it seems, the opinion of Lord Sumner, who, in a striking instance of a case where estoppel by conduct or representation was negatived, the case of *Jones* (*R. E.*), *Ltd.* v. *Waring & Gillow, Ltd.* (4), said, at p. 693:

> There was no duty between Jones, Ltd., and Waring & Gillow, Ltd., and without that, the wide proposition of Ashhurst, J., in *Lickbarrow* v. *Mason* (2) would not apply (see observations of Lord Macnaghten and Lord Lindley in *Farquharson Brothers & Co.* v. *King & Co.* (5) and of Lord Parmoor in *London Joint Stock Bank, Ltd.* v. *MacMillan & Arthur* (6), which were apparently overlooked in *Commonwealth Trust* v. *Akotey* (3).

Lord Sumner thus puts the principle of estoppel as depending upon a duty. The passage to which he refers in the speech of Lord Parmoor in *London Joint Stock Bank, Ltd.* v. *MacMillan & Arthur* (6), pointed out that the rule expressed by Ashhurst, J., was too wide, and said that the accurate rule was stated by Blackburn, J., in *Swan* v. *North*

British Australasian Co. (7). There BLACKBURN, J., referring to the judgment of WILDE, B., in the court below, said, at p. 182:

> He omits to qualify [the rule he has stated] by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the A general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.

To the same effect in *Farquharson Bros. & Co.* v. *King & Co.* (5), LORD LINDLEY said, at p. 342:

> B It is, of course, true that by employing Capon [the fraudulent clerk] and trusting him as they did the plaintiffs enabled him to transfer the timber to anyone; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach.

LORD LINDLEY then pointed out that the dictum of ASHHURST, J., is C too wide. This has been pointed out by other judges. It was indeed not necessary to the decision of the case which was before ASHHURST, J. The case of *Commonwealth Trust* v. *Akotey* (3) is also inconsistent with the case of *Johnson* v. *Crédit Lyonnais Co.* (8), where it was held that the conduct of the plaintiff, in leaving the dock warrants, which were the D indicia of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock company, did not disentitle the plaintiff from claiming for conversion against the defendants, who, in good faith, made advances to the fraudulent vendor on the security of the dock warrants E thus left in his hands. In one sense, the plaintiff, by leaving the indicia of title in the vendor's hands, had enabled him to defraud the defendants, but it was held by the Court of Appeal that, in the words of COCKBURN, C.J., at p. 36:

> The case for the plaintiff rests on the general proposition of law—which as a general proposition cannot be contested—that the mere possession of the property F of another, without authority to deal with the thing . . . otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been.

COCKBURN, C.J., adds that, if it were held that in such a case there was G an estoppel, the Factors Acts, which give a limited protection in certain cases to the unauthorised sale of goods, would have been unnecessary. In their Lordships' judgment, it cannot be said that the respondents owed any duty to the appellants in the matter. There was no relationship of contract or agency. They had no reason to think that the H documents would ever be handed to the appellants. Mr. Miller's contention that estoppel does not depend on the existence of a duty is, in their Lordships' judgment, refuted by the authorities already cited, and by many other like authorities which it is not necessary to cite.

Mr. Miller, however, argued that the necessity of a duty to constitute an estoppel applied to an estoppel based on conduct or negligence only, whereas an estoppel based on representation was different. He contended that the mere form of the railway receipts contained a representation by the respondents to any person to whom the merchants might produce it that the merchants had the power to obtain a pledge on the security of the goods. There was, he contended, in this way a representation of authority which bound the respondents, because it enabled the merchants to mislead the appellants. No question of duty or negligence arose on this view of the position, so he submitted. The document on its face conveyed a representation, when presented by the merchants to the respondents, that the merchants were invested with full disposing power. No authority was cited which, in their Lordships' judgment, would justify any such wide proposition. It is not, indeed, true to say, without qualification, that people are not bound to contemplate the possibility of, nor to take precautions against, forgery or fraud being committed. *London Joint Stock Bank, Ltd.* v. *MacMillan & Arthur* (6) is a case in which the bank's customer was held liable, because he had facilitated the fraudulent alteration of a cheque by drawing the cheque so as to leave a space which the forger could fill up, and thus alter the amount of the cheque. But that decision was expressly based on the existence of a duty arising from the contract between banker and customer, and was distinguished on that ground from *Scholfield* v. *Londesborough* (*Earl*) (9), where any duty was negatived. Even if there is a duty as between the banker and the customer in drawing a cheque, it must be shown that there was a breach of the duty by the neglect of some usual and proper precaution. It was by the absence of such proof that the case of *Slingsby* v. *District Bank, Ltd.* (10) was distinguished from the *MacMillan* case (6). In the present case, not only was there an absence of any duty or of anything amounting to a neglect of usual precautions, but also there was, in their Lordships' judgment, no ground for finding any representation. There was no reason for the respondents to think that they were representing to anybody that the merchants had any title to dispose of the goods. The railway receipts were not dangerous things; there was no question of arming the merchants with them. It is only in special conditions of fact that an estoppel by representation can be established. There are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded. Such a case was *Henderson & Co.* v. *Williams* (11), which was relied on by Mr. Miller. There was in that case an actual transfer of goods lying in a warehouse, to the order of Fletcher, a transfer made on the express instructions of the owner of the goods, who was induced to do so by Fletcher's fraud. Fletcher then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods to Fletcher's order. That was held to be a case where both the warehouseman and the owner were estopped from denying the rights of the purchaser. The warehouseman had in fact attorned to the purchaser, and it was also held that there had been a holding out by the true owner of the goods that Fletcher was capable of giving a good title. That was a very different case from the present. A similar principle of holding out has been applied in the cases where a share certificate with a transfer in blank has been placed in the hands of a stockbroker, or one in a similar position, and where it has been held A that there was a representation which constituted an estoppel. Such a case is illustrated by *Fuller* v. *Glyn, Mills, Currie & Co.* (12), where the plaintiff had left share certificates in the hands of stockbrokers. The certificates were in the name of a person from whom the plaintiffs had bought the shares, and bore upon them an indorsed form of transfer B executed by the seller. The stockbrokers used the certificates in order to obtain an advance for themselves. On their bankruptcy, the plaintiff claimed the certificates from the pledgees, but it was held that he was estopped from setting up his title as against them. The instrument was held to carry with it a representation of authority in the person entrusted C with it to deal with it, and, if produced to a third person, to be calculated to convey to that third person that such an authority existed. On the facts of such a case, there was, in addition to the form of the document, the character of the person in whose hands it was. As was said in the *London Joint Stock Bank* v. *Simmons* (13) by LORD WATSON, at p. 213:

D

> brokers, in the ordinary course of business, are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers.

Accordingly it was a reasonable assumption that the broker had full authority to deal with the securities. It is not necessary to discuss such cases further, nor to express any opinion about them, because the E material circumstances were not present here. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods, and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was, at the best, an ambiguous document. Its F possession no more conveyed a representation that the merchants were entitled to dispose of the property that the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument; the possession of the railway receipt is no more significant for this purpose than the possession of the goods G would have been. It is clear that no plea of estoppel could be raised in the cases where the merchants pledged the goods themselves after having obtained delivery under the railway receipt. It is not necessary to refer to cases where an agent, entrusted with documents with a specific authority to deal with them for his principal, has fraudulently used them H for his own purposes. Such cases are quite different.

Nor is there any basis for the contention that the respondents are liable because they omitted the precaution of putting their stamp upon the railway receipts in regard to the transactions in question. It is true that at a later date the respondents did stamp the railway receipt, and that the appellants in practice did so throughout, but it is clear, in

their Lordships' judgment, that that would have made no difference to
the course adopted by the merchants. If the stamp had the effect of
putting the bank on inquiry, the merchants would not adopt the method
of seeking to obtain a second advance on the documents, but would have
taken delivery under the receipt of the actual goods, and pledged them,
or, if they did seek to obtain a second advance on the documents, and A
had been asked by the bank to explain why the railway receipt was
stamped, might have said that they had pledged the documents and
redeemed that pledge. Having regard to the position which they held,
that explanation would, presumably, have been accepted. There is,
however, a more general answer to any argument based upon the B
respondents' failure to stamp. It is not suggested that it was a usual
practice, so that failure to adopt it could be charged against the
respondents, but, even if it were, it would still be of no avail to the
appellants, because there was no duty as between the appellants and the
respondents to adopt any such practice. As already pointed out, the C
existence of a duty is essential, and this is peculiarly so in the case of an
omission. This is so even if the case were put on representation or
holding out. The duty may be, in the words of BLACKBURN, J., "to
the general public of whom the person is one." There is a breach of the
duty if the party estopped has not used due precautions to avert the D
risk. The detriment may entitle the innocent third person either to
prosecute or to defend a claim. His identity may be ascertainable only
by the event, in the sense that he has turned out to be the member
of the general public actually reached and affected by the conduct,
negligence, representation or ostensible authority. In their Lordships' E
judgment, the appellants fail to establish these conditions.

Sect. 115 of the Indian Evidence Act does not call for particular
discussion here. It is conceded that the law it enacts is the same as the
English law: see *Sarat Chunder Dey* v. *Gopal Chunder Laha* (14), at
p. 215. For these reasons, their Lordships are of opinion that the appeal F
should be dismissed with costs. They will humbly advise His Majesty
accordingly.

Appeal dismissed with costs.

Solicitors: *E. F. Turner & Sons* (for the appellants); *Hy. S. L. Polak
& Co.* (for the respondents). G

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

HYGIENIC STORES, LTD. *v.* COOMBES.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Porter, JJ.), **December 13, 1937.**]

Medicine—Poisons—Sale by retail—Corporate body—Sale under supervision of superintendent—Sufficiency of supervision—Pharmacy and Poisons Act, 1933 (*c.* 25), *s.* 9 (1), (2).

The appellants were charged with unlawfully selling at 2, Piccadilly Circus, strychnine contained in Easton's Syrup, and at 95, Charing Cross Road, strychnine contained in a compound syrup of hypophosphites. They were also charged with unlawfully taking or causing to be taken and used at each of these addresses the title of chemist. It was alleged in each case that they were not authorised sellers of poisons. The appellants employed a registered pharmacist as superintendent in connection with the retailing and dispensing of poisons. The appellants carried on business at 16 shops in or near London, but the business carried on comprised the sale of drugs and poisons by retail at the above premises and one other shop in Edgware Road only, the other premises being mainly concerned with the sale of proprietary medicines. The superintendent attended at the Edgware Road shop during half the time the shop was open, and at each of the shops at Piccadilly Circus and in Charing Cross Road a registered pharmacist was employed as manager, and attended there during the whole time the shop was open. The superintendent was a member of the appellants' board, and the statement in writing required by the Pharmacy and Poisons Act, 1933, s. 9 (1) (*a*) (ii), had been duly made and sent to the registrar of the Pharmaceutical Society:—

HELD: the appellants' business was not, so far as concerned the sale by retail of drugs and poisons, under the personal control of the superintendent, nor, subject to the directions of the superintendent, under the personal control of a manager who was a registered pharmacist, as required by the Pharmacy and Poisons Act, 1933, s. 9 (1) (*b*), and the appellants were guilty of the offences charged.

[EDITORIAL NOTE. The question here is purely one of the construction of the terms of the Pharmacy and Poisons Act, 1933, s. 9 (1), (2), and the true definition of the expression "personal control" as used therein. The court has not seen its way to state the meaning of that term in precise language, finding it sufficient, for the purposes of the present case, to uphold the decision of the magistrate that the facts here did not show that the requisite degree of personal control was exhibited.

AS TO THE SALE OF POISONS BY CORPORATE BODIES, see HALSBURY, Hailsham Edn., Vol. 22, p. 383, para. 821; and FOR CASES, see DIGEST, Vol. 34, pp. 568, 569, Nos. 257-259.]

CASE STATED by metropolitan magistrate, sitting at Bow Street police court, under the Summary Jurisdiction Acts, 1857 and 1879, for the opinion of the court as to whether, upon the facts stated, the magistrate came to a correct determination and decision in point of law. The respondent preferred two sets of informations against the appellants. The first set charged the appellants with unlawfully selling at 2, Piccadilly Circus, strychnine contained in Easton's Syrup, and at 95, Charing Cross Road, strychnine contained in a compound syrup of hypophosphites, it being alleged in each information that the appellants were not authorised sellers of poisons. The other set of informations charged the appellants with unlawfully taking or causing to be taken and used at each of these addresses the title of chemist, it again being alleged that they were not authorised sellers of poisons.

The respondent was an inspector employed by the Pharmaceutical Society of Great Britain, pursuant to the Pharmacy and Poisons Act, 1933, s. 25. The appellants carried on business at 16 shops in or about London. At three of their shops, situate respectively at 2, Piccadilly Circus, 95, Charing Cross Road, and 24, Edgware Road, London, their business included the sale of drugs and poisons by retail, and in connection with the business at each of these shops the appellants used the title "chemist." At the remaining 13 shops, the business carried on comprised the sale by retail of medicines in various forms under proprietary or trade names. No poisons and no other medicinal substances except permanganate of potash and sandalwood oil capsules were sold. The title "chemist" was not used by the appellants in connection with any of these shops. The appellants employed a registered pharmacist as superintendent in connection with the retailing and dispensing of poisons, and, in addition to the superintendent, two registered pharmacists, who, with the superintendent, were managers respectively of each of the three shops where poisons were sold. Two of these three shops were kept open for business from 9 a.m. until 10.30 p.m. and the third from 9 a.m. until 11.30 p.m. daily, except on Sundays, when the hours were shorter. The superintendent first referred to attended at the Edgware Road shop during half the time the shop was open each day, and on some days for longer periods. At the Piccadilly Circus and Charing Cross Road shops the managers, the registered pharmacists, attended during the hours the shop was open each day, and on some days for longer periods. On Nov. 12, 1936, a poison was sold by retail to the respondent at the Piccadilly Circus shop by an assistant who was not a registered pharmacist, and when the pharmacist employed at the shop was not there. On the same day a similar poison was also sold to the respondent at the Charing Cross Road shop by the registered pharmacist there employed.

The respondent contended that: (i) the various proprietary medicines, the permanganate of potash and the sandalwood oil capsules sold by the appellants as previously stated were or contained drugs; (ii) the appellants were carrying on at each of the 13 shops above mentioned, as well as at the other three shops, a business comprising the retail sale of drugs, and that at none of the shops was the retail sale of drugs under the personal control of a pharmacist; (iii) in the shops at each of which a pharmacist was employed, the hours of business were so long that the pharmacist so employed was unable to, and in fact did not, personally control within the meaning of the Pharmacy and Poisons Act, 1933, the business carried on there in the sale of drugs by retail; (iv) the appellants therefore did not fulfil the requirements of the Pharmacy and Poisons Act, 1933, s. 9 (1), and were not authorised sellers of poisons within the meaning of that Act.

The appellants contended that, on the facts stated, the magistrate was wrong in finding that the respondent had failed to prove, and that there was no evidence upon which he could find, that the appellants were not authorised sellers of poisons within the meaning of the Act. The only contest on this point being as to whether the appellants had
A complied with the requirements of sect. 9 (1) (*b*) of the Act, the appellants contended that the respondent had failed to prove, and that there was no evidence upon which the magistrate could find, (i) that in any of the appellants' shops the business was, so far as concerns the retail sale of drugs, not carried on either under the personal control of the
B superintendent or under the personal control of a manager who was a registered pharmacist, or (ii) that the business carried on by the appellants at the 13 shops referred to before included the retail sale of drugs. The following are the specific sub-paragraphs of para. 4 of the case referred to in the judgments :

C

(ii) The appellants carry on business at 16 shops in or near London.

(iv) At the remaining 13 of the said 16 shops the business carried on by the appellants comprises the sale by retail of medicines in the form of pills, tablets and tonics and so forth sold under proprietary or trade names ; but no poisons and no other medicinal substances except permanganate of potash and sandalwood oil capsules are sold. The appellants do not use the title chemist or any other title the use of which is restricted by law to pharmacists or authorised sellers of poisons
D in connection with any of the said 13 shops. The substantial business of each of the said 13 shops is the sale of contraceptives.

(ix) At the shops 2, Piccadilly Circus, and 95, Charing Cross Road, the registered pharmacists employed as managers of each of the said shops attend there during the hours when the shop is open each day, and on some days for longer periods.

The Pharmacy and Poisons Act, 1933, s. 9 (1), (2), is as follows :

E

(1) Subject to the provisions of this section, a body corporate carrying on a business which comprises the retail sale of drugs shall be an authorised seller of poisons within the meaning of this Act if the following conditions are complied with : (*a*) the business must, so far as concerns the keeping, retailing, dispensing and compounding of poisons, be under the management of a superintendent in relation to whom the following requirements are fulfilled : (i) he must be a registered pharmacist ; (ii) a statement in writing signed by him and on behalf of the body
F corporate stating his name and specifying whether or not he is a member of the board must have been sent to the registrar ; (iii) he must not be acting at the time in a similar capacity for any other body corporate ; and (*b*) in each set of premises where the business is carried on, the business must, so far as concerns the retail sale of drugs, if not under the personal control of the superintendent, be carried on, subject to the directions of the superintendent, under the personal control of a manager or assistant who is a registered pharmacist ; and (*c*) the name and
G certificate of registration of the person having the control of the business as aforesaid, whether he is the superintendent or some other person, must be conspicuously exhibited in the premises.

(2) Notwithstanding the restrictions imposed by the foregoing provisions of this Act on the use of certain titles, emblems and descriptions, a body corporate which is an authorised seller of poisons may, if the superintendent is a member of the board, use the description of "chemist and druggist," or of chemist, or of druggist, or of dispensing chemist or dispensing druggist, and may use the description
H "pharmacy" in connection with the business : Provided that nothing in this subsection shall authorise the use of any of the said descriptions in or on any premises which are for the time being disqualified by virtue of a direction under this section from being registered in the register of premises, or in connection with any business so far as it is carried on in any premises so disqualified.

D. N. Pritt, K.C., and *A. M. S. Stevenson* for the appellants.

Roland Oliver, K.C., and *H. Glyn-Jones* for the respondent.

Lord Hewart, L.C.J.: In my opinion this appeal ought to be dismissed. The magistrate, having heard the evidence, and having found the facts, came to the opinion which he expressed in these words, and it seems to me that every word of them is important:

> I being of opinion that in each set of premises where the appellants' business was carried on as aforesaid the said business was not so far as concerns the retail sale of drugs under the personal control of the superintendent or subject to the directions of the superintendent under the personal control of a manager or assistant who was a registered pharmacist and that the business carried on by the appellants at the 13 shops referred to in para. 4 (iv) hereof did include the retail sale of drugs held that the appellants were guilty of each of the said offences.

It is said, first, that the magistrate here has omitted to find facts which he ought to have found, and, secondly, that he has misdirected himself upon the meaning of part or parts of the section. In my opinion, each of those criticisms fails. I see no indication whatever that the magistrate has failed correctly to understand any part of this not very difficult statute. In his findings of fact, so far as the drugs are concerned, he has quite clearly stated the facts. So far as the topic of personal control is concerned, it seems to me that, looking at the case as a whole, the magistrate has really come to the conclusion, upon the facts, that, whatever may be the true definition of the expression "personal control," he cannot hold, on the facts found here, that the requisite degree of personal control is exhibited.

In my opinion, he was quite justified in coming to the conclusion to which he came, and, when we are asked whether he gave a correct decision in point of law, I think that the answer must be: "Yes, it was correct; you have correctly set out your findings of fact; you have correctly interpreted the relevant sections of the law, and the expressions contained in them." I think, therefore, that this appeal must be dismissed.

Branson, J.: I agree.

Porter, J.: I agree. As I understand it, the appeal must fail in either of two sets of circumstances—if there is a finding against the appellant under either sect. 9 (1) (*a*) or sect. 9 (1) (*b*). So far as subsect. (*b*) is concerned, the question is whether or not the articles sold at the 13 shops were drugs. That seems to me to be clearly shown by the finding of fact in para. 4 (iv). So far as the other matter is concerned, I find myself in agreement with the other members of the court, that one can draw an inference from the finding of fact in para. 4 (ix) coupled with the finding in para. 4 (ii). For these reasons, I agree with Lord Hewart, L.C.J., that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *King-Hamilton & Green* (for the appellants); *A. C. Castle* (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

DRAKELEY *v.* MANZONI.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Porter, JJ.), **December 16, 1937.**]

Public Health—Moveable dwellings—Vans—Land occupied by vans used for human habitation—Showmen—No permission from corporation—Birmingham Corporation Act, 1935 (*c. cxxii*), *s.* 43.

The appellant was the owner of certain land within the jurisdiction of the corporation of Birmingham. Without having obtained the approval of the corporation, she allowed certain showmen to occupy this land with the vans in which they lived :—

HELD : whereas the exemption contained in the Birmingham Corporation Act, 1935, s. 43 (3) (*b*), operated in favour of the showmen, it did not operate in favour of the owner of the land, who had therefore been guilty of an offence under this Act.

[EDITORIAL NOTE. A local Act provided that no van intended to be used for human habitation should be placed upon any land without the previous approval of the corporation. There was an exception in favour of travelling showmen, but the exception is construed as applying only to the showmen, and not to the owner of the land. It was necessary, therefore, for the latter to obtain the approval of the corporation when granting permission to showmen to place their caravans thereon.

AS TO MOVEABLE DWELLINGS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 364, 365, para. 730 ; and FOR CASES, see DIGEST, Vol. 38, pp. 187, 188, Nos. 260-263.]

APPEAL by way of case stated from the decision of the justices construing the Birmingham Corporation Act, 1935, s. 43. The facts are fully set out in the judgment of LORD HEWART, L.C.J.

A. P. Marshall for the appellant.

Christmas Humphreys for the respondent.

LORD HEWART, L.C.J. : In this case, the respondent preferred against the appellant an information charging that without the previous approval of the corporation of Birmingham she permitted to be used certain land for occupation by vans or similar structures used for human habitation contrary to the Birmingham Corporation Act, 1935, s. 43. The justices, having heard the information, convicted the appellant, and the question for this court is whether in so deciding the justices came to a correct determination in point of law. I am bound to say, speaking for myself, that I think the drafting of the Birmingham Corporation Act, 1935, s. 43, is not very happy, and its terms are such as might easily be misleading, but it has been truly observed that we have to construe this section as it is, and not as it might have been, and I have come to the view, not without hesitation and reluctance, that the opinion of the justices is to be supported. That opinion is clearly expressed in paras. 9 and 10 of the case. They say :

> (9) We observed that with the one personal exception of a showman all the exemptions from the section related to tents, vans and other structures used in specified circumstances by specified persons, and that among those exemptions were not included the vans used by showmen. (10) We, being of opinion that the personal exemption enjoyed by showmen and similar persons under subsect. (3) (*b*) of the

section did not extend to the owner of land who might permit accommodation for their vans, came to the conclusion that the appellant should have sought the approval of the corporation to the use of the land for such purpose, and in the absence of such approval an offence had been committed.

The opening words of sect. 43 (3), "this section shall not apply to," seem to say that nothing in the section is to apply directly or indirectly to the things or persons there set out, but I fear that one cannot overlook the difference of phraseology exhibited by subsect. (3) and subsect. (4). By subsect. (3) it is provided that : A

> This section shall not apply to (*a*) . . . a van . . . which is not used or intended to be used by the occupier as a sole or principal means of habitation for an unbroken period of at least six weeks, or (*b*) any person dwelling in a tent or van or other similar structure who is a roundabout proprietor, travelling showman or stallholder not being a pedlar or hawker. B

Now, subsect. (3) (*a*) does not apply to this case. The occupation here is not said to have been, or to have been intended to be, for the period which would be exempted. The exemption relied upon is subsect. (3) (*b*) relating to a person dwelling in a van who is a travelling showman or stallholder. But contrasted with that terminology are the words in subsect. (4) : C

> This section shall not apply to any tent, van, or shed belonging to any person and situate within the curtilage of the dwelling-house of such person and occupied by such person or any member of his family or household.

D It looks as if the Act provides, as Mr. Christmas Humphreys has said, a two-fold control. Sect. 43 (1) (*a*), (*b*), says :

> (*a*) No van . . . used or intended to be used for human habitation shall be placed or . . . kept on any land situate within the city without the previous approval of the corporation. (*b*) It shall not be lawful for any person without the previous approval of the corporation to let or permit to be used any land for occupation.

E Reading that with subsects. (3) and (4), I am driven to the conclusion that, so far as the exemption relating to travelling showmen and stallholders is concerned, it was an exemption for them individually. They are not to be prosecuted ; they are not to be liable to the penalty. But other considerations apply to a person who permits land to be used for occupation in that way. It is a difficult conception, because it seems to say to these showmen : "You shall not be hit if you do a certain act, but the person who permits you to do that act will be hit, and therefore he is not likely to permit you to do that act." On the other hand, no doubt, there is land, and we may assume that there is land, upon which the travelling showman might conceivably erect his tent or put his van without anyone's permission, as, for example, common land. The protection, therefore, to a travelling showman in his individual act may have some scope for its operation, but nothing like the scope that it would have if neither he nor the person who permits him to do these acts can be prosecuted. I say that I have come to this conclusion with difficulty and hesitation, but I am not prepared to say that these justices were wrong in the view which they took of this curious section of this Act. F G H

BRANSON, J. : I agree, and I desire to add only a word or two. I think that, when one looks at the first two subsections, (1) (*a*) and (1) (*b*), one sees that in (*a*) the prohibition is phrased : " No van shall be placed " and so forth, while in (*b*) the words are : " No person shall permit any van to be placed." Then you come to subsect. (3), and (*a*) is dealing with the van which it exempts from the operation of the section, a van not intended to be used for an unbroken period of at least six weeks, whereas, if the construction for which the appellant contends was right, one would expect to find in (*b*) : " A van being used by a person who was a roundabout proprietor, travelling showman, etc." You do not find that. You find that the exemption is an exemption of any person dwelling in a tent. Then, when you look at subsect. (4), you find used language which is like that in subsect. (3) (*a*), so that subsect. (3) (*b*) stands entirely by itself. As LORD HEWART, L.C.J., has pointed out, a personal exemption of a showman or roundabout proprietor might operate to his advantage if there was common land upon which he wanted to place his van, or, indeed, if he had himself bought the piece of land upon which he wished to place his van. One cannot, therefore, say that the construction placed upon subsect. (3) (*b*) by the justices renders the exemption inoperative. I agree with LORD HEWART, L.C.J., that one comes to this conclusion with regret, but it appears to me to be a conclusion to which we are forced by the language of the statute. I agree, therefore, that the appeal should be dismissed.

PORTER, J. : I agree.

Appeal dismissed.

Solicitors : *J. H. Milner & Son*, agents for *Philip Baker & Co.*, Birmingham (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *F. H. C. Wiltshire*, Town Clerk, Birmingham (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

MASTER AND FELLOWS OF UNIVERSITY COLLEGE, OXFORD *v.* SECRETARY OF STATE FOR AIR.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Porter, J.J.), **December 15, 1937.**]

Compulsory Purchase—Compulsory acquisition of land by Crown for purposes of aerodrome—Injurious affection of adjoining land by use of acquired land—Whether compensation payable therefor—Defence Act, 1842 (c. 94), *ss.* 19, 23, 24.

The owners of land which was compulsorily acquired by the Crown for the purposes of an aerodrome claimed compensation for injurious affection of their adjoining land arising out of the user of the land acquired :—

HELD : the compensation claimed was recoverable, as provided by the Defence Act, 1842.

Decision in Blundell v. *R.* (1) *followed.*

[**EDITORIAL NOTE.** This case deals with one point only, and decides that, upon the compulsory purchase of land for an aerodrome, compensation for injurious affection of adjoining land is recoverable.

AS TO INJURIOUS AFFECTION, see HALSBURY, Hailsham Edn., Vol. 6, pp. 52, 53, para. 49 ; and FOR CASES, see DIGEST, Vol. 11, pp. 132-136, Nos. 201-223.]

Case referred to:

(1) *Blundell* v. *R.*, [1905] 1 K.B. 516; 11 Digest 547, *501*; 74 L.J.K.B. 91; 92 L.T. 53.

SPECIAL CASE stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). The Defence Act, 1842, provides for "compensation to be paid for the absolute ownership of land or the possession or use thereof." Sect. 24 is in the following terms:

> 24. In all cases where any lands, buildings, or other hereditaments shall have been taken under the provisions of the said recited Act of the forty-fourth year of the reign of his Majesty King George the Third, or shall be taken under the provisions of this Act, for any term of years, or for such period only as the exigencies of the public service shall require, it shall be lawful for the said principal officers, notwithstanding anything hereinbefore contained, or any other law to the contrary thereof notwithstanding, at any time before the possession thereof shall be delivered up to the owner or owners thereof, or other person or persons acting on his, her, or their behalf, to take down and remove all such buildings or other erections which shall or may have been built or erected thereon for the public service, after the same was or were so taken as aforesaid, and to carry away the materials thereof, making such compensation to the owner or owners of such lands, buildings, or other hereditaments, or other person or persons acting on his, her, or their behalf, for the damage or injury which may have been done thereto or to the soil thereof, by the erection of any such buildings, or otherwise in consequence of the same having been occupied for the public service, as the said principal officers shall think reasonable, and as shall be agreed upon in that behalf; and if such owner or owners, or other person or persons acting on his, her, or their behalf, shall not be willing to accept the compensation so offered, it shall be lawful for the said principal officers to apply to and require two justices of the peace of the county, riding, stewartry, city, or place to settle and ascertain the compensation which ought to be made for such damage or injury as aforesaid, and such justices shall settle and ascertain the same accordingly, and shall grant a certificate thereof; and the amount of such compensation, so settled and ascertained and certified, shall forthwith be paid by the treasurer, accountant, or other proper officer for the time being of the office or department for the use of which such lands, buildings, or other hereditaments shall have been taken to the person or persons entitled thereto: Provided always, that nothing in this Act contained shall extend or be construed to extend to alter, prejudice, or affect any agreement which hath been or shall or may be entered into by the said principal officers with any owner or owners of any such lands, buildings, or other hereditaments, or other person or persons acting on his, her, or their behalf, in relation to any such buildings or erections, but every such agreement shall remain valid and effectual in like manner as if this Act had not been passed.

Land comprising 417 acres situate at Linton-upon-Ouse, in the North Riding of Yorkshire, and owned by University College, Oxford, was compulsorily acquired by the Crown for the purposes of an aerodrome. The land acquired lay in the middle of a larger estate owned by the College. The only question raised in the special case was whether the owners of the acquired land were entitled to recover damages for injurious affection to the remainder of their land resulting from the user to which the acquired land might be put by the Crown. The price of the acquired land was not in dispute. The official arbitrator decided that in fact the claimants' remaining land would be injuriously affected to the amount of £4,000 by reason of the said user.

A. M. Trustram Eve, K.C., and *Arthur Capewell* for the claimants.

The Solicitor-General (*Sir Terence O'Connor, K.C.*,) and *Horatio Parker* for the Crown.

LORD HEWART, L.C.J.: This is an award stated in the form of a special case under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). The case raises one question and one alone: whether the court is of opinion that the claimants are entitled in law to claim for injurious affection to the remainder of their property by reason of the user to which the land to be purchased may be put by the respondent. Our unanimous answer to that question is: Yes. In cases arising in this way, it is not the practice of the court to enter into reasons, but in this case we will add that we base our answer on the provisions of the Defence Act, 1842, and that, in our view, the decision of *Blundell* v. *R.* (1), a petition of right tried in 1905 by RIDLEY, J., was right.

Solicitors: *Field, Roscoe & Co.*, agents for *Morrell, Peel & Gamlen*, Oxford (for the claimants); *Treasury Solicitor* (for the Crown).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

RADCLIFFE *v.* RIBBLE MOTOR SERVICES, LTD.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Luxmoore, J.), **October 20, 21, 22, December 20, 1937.**]

Master and Servant—Liability in case of accident—Defences—Common employment—Coach driver driving one of six coaches returning to garage—Death caused by another coach belonging to same company.

The plaintiff's husband was a coach driver, who was killed while six coaches, the property of the defendant company, were returning to the defendants' garage. In an action for damages for negligence, the defendants pleaded common employment. It was proved in evidence that these coaches had conveyed three parties of excursionists from Liverpool to New Brighton, and were returning empty at the time of the accident. The drivers were supposed to return to the garage by the most direct route, but were under no obligation to keep together. The coach driven by the deceased had stopped, owing to some mechanical trouble, and the deceased had dismounted to find out what it was. The driver of the following coach pulled up to see whether he could be of assistance, and, while his coach was drawing in to the side of the road, the deceased was crushed in between the two vehicles:—

HELD: the two drivers were carrying out a common task in driving these coaches of their employer back to the garage, and, in the circumstances, the defence of common employment ought to succeed.

[EDITORIAL NOTE. The question arises in this case as to whether the respective drivers of two of several coaches, which carried three parties of excursionists upon their outward journey, and returned empty to their garage, were engaged in a common work within the decisions upon the doctrine of common employment. It seems obvious that upon the outward journey the coaches would keep together as a fleet. The instructions to the drivers as to the return journey were to return direct to the garage, and this is held to signify that they would keep together upon the return journey, and that, if one of them got into difficulties, one of the other drivers would pull up in order to render such assistance as was possible in the circumstances. For this reason, the defence of common employment succeeded.

AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 211-217, Nos. 1744-1789.]

Cases referred to:

(1) *Rose* v. *Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.
(2) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; 34 Digest 71, *479*; 7 L.J. Ex. 42.
(3) *Fanton* v. *Denville*, [1932] 2 K.B. 309; Digest Supp.; 101 L.J.K.B. 641; 147 L.T. 243.
(4) *Morgan* v. *Vale of Neath Ry. Co.* (1864), 5 B. & S. 570; on appeal (1865), L.R. 1 Q.B. 149; 34 Digest 212, *1750*; 35 L.J.Q.B. 23; 13 L.T. 564.
(5) *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266; 34 Digest 126, *971*; 31 L.T.O.S. 255.
(6) *Farwell* v. *Boston & Worcester Railroad Corpn.* (1842), 3 Macq. 316; 4 *Metcalf* 49.
(7) *Bartonshill Coal Co.* v. *McGuire* (1858), 3 Macq. 300; 34 Digest 126, *972*; 31 L.T.O.S. 258.
(8) *Tunney* v. *Midland Ry. Co.* (1866), L.R. 1 C.P. 291; 34 Digest 209, *1717*.
(9) *The Petrel*, [1893] P. 320; 34 Digest 213, *1757*; 62 L.J.P. 92; 70 L.T. 417.
(10) *Wilsons & Clyde Coal Co.* v. *English*, [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.
(11) *Hutchinson* v. *York, Newcastle, & Berwick Ry. Co.* (1850), 5 Exch. 343; 34 Digest 207, *1697*; 19 L.J. Ex. 296; 15 L.T.O.S. 230.
(12) *Wigmore* v. *Jay* (1850), 5 Exch. 354; 34 Digest 208, *1698*; 19 L.J. Ex. 300; 15 L.T.O.S. 206.
(13) *Charles* v. *Taylor, Walker & Co.* (1878), 3 C.P.D. 492; 34 Digest 212, *1749*; 38 L.T. 773.
(14) *Hedley* v. *Pinkney & Sons S.S. Co.*, [1894] A.C. 222; 34 Digest 210, *1726*; 63 L.J.Q.B. 419; 70 L.T. 630.
(15) *Burr* v. *Theatre Royal, Drury Lane, Ltd.*, [1907] 1 K.B. 544; 34 Digest 210, *1728*; 76 L.J.K.B. 459; 96 L.T. 447.
(16) *Hayward* v. *Drury Lane Theatre & Moss' Empires*, [1917] 2 K.B. 899; 34 Digest 216, *1787*; 87 L.J.K.B. 18; 117 L.T. 523.

APPEAL AND CROSS-APPEAL from a decision of HAWKE, J., dated Feb. 20, 1937.

R. P. Croom-Johnson, K.C., and *S. Scholefield Allen* for the appellants.

William Gorman, K.C., and *B. R. Rice-Jones* for the respondent.

Croom-Johnson, K.C.: If two drivers of the same employer are continually meeting, they are under a common duty to each other. The coaches here were being used on the same day, and over what was in substance the same route. Where there is a fleet of ships sailing together in convoy, then the doctrine of common employment applies. It is otherwise if the ships are sailing apart. It is the same where there are coaches following the same route. [Counsel referred to *Wilsons & Clyde Coal Co.* v. *English* (10), *Priestley* v. *Fowler* (2), *Hutchinson* v. *York, Newcastle, & Berwick Ry. Co.* (11), *Wigmore* v. *Jay* (12), and *Bartonshill Coal Co.* v. *Reid* (5).] The test is, can it be said that it is common work? The two drivers were contributing to the common benefit of their employer by bringing these coaches to their destination. That is common employment. [Counsel referred to *Farwell* v. *Boston & Worcester Railroad Corpn.* (6), *Morgan* v. *Vale of Neath Railway Co.* (4), *Tunney* v. *Midland Railway Co.* (8), and *The Petrel* (9).] The time to be considered is the time when the drivers were engaged to do the work in question. The question is, what were they employed to do at the moment they

were employed to do it? If one knows of a danger, and knowingly incurs it, one cannot claim damages. [Counsel referred to *Charles* v. *Taylor, Walker & Co.* (13), *Hedley* v. *Pinkney & Sons S.S. Co.* (14), *Burr* v. *Theatre Royal, Drury Lane, Ltd.* (15), *Hayward* v. *Drury Lane Theatre & Moss' Empires* (16), *Fanton* v. *Denville* (3), and *Wilsons &*
A *Clyde Coal Co.* v. *English* (10).] It cannot make any difference whether the accident took place on the master's premises or elsewhere. Earlier cases can be found where the accident did take place on the master's premises, but in *The Petrel* (9) it was not so. In that case, it was purely fortuitous that the two ships happened to be in the same locality at the
B same time. Two persons driving two coaches from a fleet from the same garage must be included in the doctrine of common employment. They were serving the same master. Three things have to be shown: (i) there must be common employment of the two men; (ii) they must each be employed in the same business of their employer; and (iii) the work
C must in fact bring the two persons into the same area of business. All those considerations apply to this case.

Gorman, K.C.: An employee impliedly contracts to bear the normal incidents of his contract. He agrees to exonerate his employer from the natural risks incidental to his employment. Incidental means that he
D cannot carry on his employment without taking such risks. One cannot assume that there are additional risks merely because the employer has other coaches on the road. He may contemplate that, if his work is in the same garage as that used by other drivers, there will be risk of injury by those with whom he must necessarily work. The risk contemplated
E must be a definite part of his employment. The defence of common employment completely fails, because under that doctrine the driver of the other coach had a contractual duty to pull up when he saw that Radcliffe's coach had stopped. The judge found as a fact that the return journeys of these coaches were independent. It cannot be said, merely
F because there were other coaches on the road, that this was a contemplated risk. These coaches were not under any orders to keep together. They had been used by three different parties of travellers. There was nothing to prevent a driver from taking any route he chose. It is not correct to say that they were a convoy. [Counsel referred to *Wilsons & Clyde*
G *Coal Co.* v. *English* (10), *Hutchinson* v. *York, Newcastle, & Berwick Ry. Co.* (11), *Priestley* v. *Fowler* (2), *Wigmore* v. *Jay* (12), *Bartonshill Coal Co.* v. *Reid* (5), *Morgan* v. *Vale of Neath Ry. Co.* (4), *Charles* v. *Taylor, Walker & Co.* (13), *Farwell* v. *Boston & Worcester Railroad Corpn.* (6), and *The Petrel* (9).] The doctrine cannot apply to two or three coaches
H being driven on different routes. Otherwise it would apply to every coach of the defendants which had to return to its garage that day. There is no evidence that this was a risk that the deceased ever contemplated. [Counsel referred to *Burr* v. *Theatre Royal, Drury Lane, Ltd.* (15) and *Fanton* v. *Denville* (3).]

Croom-Johnson, K.C., in reply.

GREER, L.J. [read by SCOTT, L.J.]: In this action the trial judge gave judgment in favour of the plaintiff under Lord Campbell's Act for £1,589 8*s.* 6*d.* with costs, and assessed at £500 the damages to which she would be entitled as administratrix of her deceased husband by reason of the Law Reform (Miscellaneous Provisions) Act, 1934. No question arises in this appeal with reference to the £500, as it is now admitted, in consequence of the decision of the House of Lords in *Rose* v. *Ford* (1), that the plaintiff will be entitled to succeed in respect of the sum so assessed by the judge if she succeeds in her appeal on the point as to common employment.

The question involved in the appeal is whether the negligence of the defendants' driver, which resulted in the death of the plaintiff's husband E. C. Radcliffe, was the negligence of a servant in common employment with the deceased within the doctrine of law which protects a master from being liable to his servants for the negligence of those in common employment. In order to determine this question, it is necessary to state with precision the facts which were proved at the trial.

In May, 1936, the Copmanthorpe Women's Association, the Copmanthorpe Church School, and another association at Copmanthorpe, applied to Messrs. Dean & Dawson, the well-known firm of travel agents, to supply them with coaches to carry their respective parties from Reece's café, Parker Street, to the Liverpool Cathedral, and, after they had seen the cathedral, to New Brighton, where they wished to be discharged from the coaches, and did not require to be brought back again to Liverpool. In pursuance of those instructions, Messrs. Dean & Dawson applied to the defendant company, who run coaches from their garage in Hawthorne Road, Bootle, to various destinations, and also supply coaches on hire, when asked, for a quotation for the necessary coaches. The defendant company replied by sending, as follows, three quotations, relating severally to the requirements of each association:

> Private Hire Quotation No. 8180.
>
> Dear Sir or Madam, In reply to your inquiry we beg to quote as follows (subject to the conditions overleaf) for one coach to seat 31 from Reece's Café Parker Street time 1.40 to Cathedral and New Brighton in Sun Saloon coaches on Thursday June 25, 1936, via Direct to Cathedral half hour thence to New Brighton via Tunnel Seacombe and Egremont, via no return. Passengers 31 net price, including Tunnel fees: £2 14*s.* 3*d.* Less 10% 4*s.* 5*d.*—£2 9*s.* 10*d.* Yours faithfully, *per pro* Ribble Motor Services, Ltd. Charles. Tunnel fees are 14*s.* 2*d.* Thursday, June 25, 1936.
>
> Private Hire Quotation No. 8179.
>
> Dear Sir or Madam, In reply to your inquiry we beg to quote as follows (subject to the conditions overleaf) for one coach to seat 32 from Reece's Café Parker Street time 1.40 p.m. to Cathedral and New Brighton on Sun Saloon Coaches on Thursday June 25, 1936, via Direct to Cathedral half hour stay thence direct to New Brighton via Tunnel Seacombe and Egremont. No return journey. Passengers 32 net price including Tunnel fees: £2 14*s.* 3*d.* Less 10% on £2 3*s.* 11*d.*, 4*s.* 5*d.*—£2 9*s.* 10*d.* Booked C.S. Yours faithfully, *per pro* Ribble Motor Services, Ltd. Charles. Tunnel fees are 14*s.* 2*d.* Thursday, June 25, 1936.
>
> Private Hire Quotation No. 7420.
>
> Dear Sir or Madam, In reply to your inquiry we beg to quote as follows (subject to the conditions overleaf) for four coaches to seat 124 from Reece's Café Parker Street time 1.40 p.m. to Cathedral (on latest Sun Saloons) Mersey Tunnel New Brighton on Thursday, June 25, 1936, via Mersey Tunnel Egremont. No return

journey. Passengers 124 net price including Tunnel fees; £10 17*s.* Less 10% 15*s.* 7*d.*—£10 1*s.* 5*d.* Yours faithfully, *per pro* Ribble Motor Services, Ltd. Tunnel fees are £3 0*s.* 8*d.* Thursday, June 25, 1936.

It will be observed that the agreement concluded with regard to each and every one of the coaches ordered was that they were to start at 1.40 p.m. from Reece's café to the Cathedral. Before the coaches started A from the defendants' garage, each of the drivers was instructed to start from Reece's café on the journey to the Cathedral and thence to New Brighton. The coaches arrived in sufficient time to pick up the three parties of excursionists at Reece's café. They arrived considerably before 1.40 p.m., and waited until that time. They then started off B together at the same time and went to the Cathedral, and, after waiting until the members of each of the three sets of excursionists were ready to resume their places in the coaches, they took them through the Mersey Tunnel to Birkenhead, and from the exit of the tunnel in Birkenhead via Seacombe and Egremont to New Brighton, where they discharged C their passengers. The drivers' instructions as to the return journey were to return direct to the garage, though this was not upon their written instructions. The contract between Messrs. Dean & Dawson and the defendants for the hire of the coaches ceased when the passengers were discharged at New Brighton. Therefore the question of agency D does not arise for determination.

The question we have to determine is whether the defendants' driver Jones was, at the time he negligently caused the death of the deceased man Radcliffe, in common employment with the deceased man. The written instructions to Jones were as follow: E

> Outward Journey: Driver on duty 12.55 p.m. Garage (depart) 1.10 p.m. Picking-up point Reece's Café, Parker Street. Time 1.40 p.m. Destination New Brighton. Route Cathedral (direct) Mersey Tunnel Egremont. Return Journey; Destination (blank). Route no return journey.

The written instructions to the deceased man were as follow: F

> Outward Journey: Driver on duty 1.0 p.m. Garage (depart) 1.15 p.m. Picking up point Reece's Café, Parker Street. Time 1.40 p.m. Destination New Brighton. Route Cathedral (half hour's stay). Tunnel. Seacombe. Egremont. Return Journey. No return journey.

It seems to me that, on the vital question, the instructions with regard G to the return journey, so far as they were in writing, were the same in both cases, but it was proved, and not contradicted, that oral instructions were given by the man in charge of the garage to all the drivers of the six coaches that, after leaving New Brighton, they were to go back direct to the garage. Notwithstanding the difference in time H suggested by the written instructions with regard to the outward journey, it was proved that all the coaches went together from the garage to Reece's café, waited there together until 1.40 p.m., went together to the Cathedral as a team, and, starting from there at the same time, went together as a team to New Brighton. However, I do not think the instructions as to the outward journey are relevant to the consideration of what Jones and the deceased man were doing on the journey back to the garage. All the coaches came back the same way from New Brighton to the entrance to the tunnel at Birkenhead. They came back as a team, as they had gone as a team, but there was some disorganisation, first, at the entrance to the tunnel at Birkenhead, and, secondly, in the course of going through the tunnel some of them were delayed at the turn in the tunnel where there are traffic lights. When the coach driven by the deceased man and those driven respectively by Jones and by another man called Cartmel emerged from the tunnel, the deceased man proceeded to take his coach by a route which, beginning at William Brown Street, would have taken him through Islington to Christian Street, and then by Cazneau Street and Stanley Road to the garage in Hawthorne Road, Bootle. Jones followed him, intending to go by the same route, and Cartmel followed Jones. The route so taken by the three coaches was certainly not the nearest way to the garage, as the judge found on looking at the map, but the drivers of all three coaches that went by William Brown Street were doing so in pursuance of what they conceived to be the right way to carry out their instructions to go direct to the garage. After the deceased man had driven his coach as far as the steps of the museum in William Brown Street, his coach stopped, and he got out of it to see what was wrong. Jones, who was then behind him, endeavoured to get in front of him, with the idea of stopping and seeing what was wrong, and, I think, in order to see whether he could assist in correcting anything that happened to be wrong. Jones did not see Radcliffe, who was standing on the off side of his coach, and unfortunately Radcliffe was crushed, and received injuries from which he died. The trial judge found that Jones was guilty of negligence, and this is not now disputed. It was admitted that, on the homeward journey, each driver could go any way that he chose. It was stated by Mr. Parsons, who was in charge of the garage, that it was customary for anybody on a common errand to stop when a driver had broken down, and to inquire what was wrong.

The above seem to me to be the facts, proved at the trial, relevant to the question as to whether the deceased man and Jones were in common employment, within the meaning of the cases, at the time the deceased received his fatal injuries, which, as is not disputed, were occasioned by the negligence of Jones. In my judgment, the weight of authority is in favour of the view that the two men were, at the time when the deceased was fatally injured, in common employment within the meaning of the doctrine of common employment as applied in the decided cases. All the cases which have touched on the question of common employment, beginning with *Priestley* v. *Fowler* (2), down to *Fanton* v. *Denville* (3), were cited in the argument. I do not propose to examine all these cases in detail, but to state what propositions of law can, in my opinion, be gathered from the cases cited.

I think it is established, first, that in every contract of service there is implied by law a promise by every employee that he accepts the risk of injury by the negligence of his fellow employees engaged in common employment with him. In *Morgan* v. *Vale of Neath Ry. Co.* (4), **BLACKBURN, J., says, at p. 578 :**

A
> That principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services ; the presumption of law being that the compensation was adjusted accordingly . . .

In giving his judgment in *Bartonshill Coal Co.* v. *Reid* (5), LORD CRANWORTH, L.C. said, at p. 277 :

B
> The law of England considers that the person who undertakes the service undertakes it knowing that he is liable to injury as well from accidents that cannot be guarded against, as from neglect or mismanagement on the part of those who are engaged with him in the common occupation.

In the judgment of SHAW, L.C.J., in the case of *Farwell* v. *Boston & Worcester Railroad Corpn.* (6), which is referred to with approval in C the opinion of the House of Lords in *Bartonshill Coal Co.* v. *Reid* (5), the rule is stated as follows, at p. 317 :

> The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly.

D
I think that we are bound to hold that the undertaking by an employee with reference to the risks of common employment arises from an implication imposed by law in every case of employment where there are no circumstances which indicate a contrary intention.

E In the second place, I think that it is well-established that it is not sufficient merely to show that the negligent employee and the one who is claiming damages based on that negligence are servants of a common master. LORD BROUGHAM said, in giving judgment in *Bartonshill Coal Co.* v. *McGuire* (7), at p. 313 :

F
> To bring the case within the exemption, there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that common employment.

There are several cases which establish that two men may be in common employment within the doctrine relating to common employment even though they are working in different departments of duty. For example, G it was held in *Bartonshill Coal Co.* v. *Reid* (5) that, where a collier was injured by the negligence of the engineer working the cage, the two men were in common employment at the time when the injuries were inflicted on the collier, the husband of the pursuer. In *Morgan* v. *Vale of Neath Ry. Co.* (4) it was held that a carpenter standing upon a scaffold, H engaged on the roof of an engine-shed, was in common employment with certain porters whose duty it was to operate turntables on the ground floor. In *Tunney* v. *Midland Ry. Co.* (8) it was held that the plaintiff in the action, who was in the course of his duty travelling home in one of the defendants' trains, was in common employment with the driver of the engine which was drawing the train in which he was, and was also in common employment with the driver of another engine with which it collided. There is no case in which it has ever been held that two employees, together carrying out the same order of their employer, are not in common employment. In my view, the present case is an *a fortiori* case to *Morgan* v. *Vale of Neath Ry. Co.* (4) and *Tunney* v. *Midland Ry. Co.* (8). In my judgment, it is not the law that two A employees carrying out similar orders, in close juxtaposition to one another, are not engaged in a common employment. To me it seems quite clear that, at the time of the accident, Jones and the deceased man Radcliffe were not only in the employ of the same master, but also engaged in the same common work. B

I have considered the case of *The Petrel* (9). It is not necessary to determine whether the decision of JEUNE, P., was or was not right. The facts of that case were entirely different from those in the present case. I think that the two men in the present case were engaged in common work within the meaning of the decisions of the court, because, as I C have said, they were engaged in carrying out together the order of their employer to return direct to the garage, and because Jones was in fact doing what his employer expected him to do. That is to say, he was trying to get in front of the deceased's coach and then to pull up and go to his assistance. The judge rightly says in his judgment: D

> I was quite clear that the mere fact that two men serve one master does not necessarily bring them within the doctrine. I think that they must have not merely a common master but have been engaged in a common employment.

After referring to *The Petrel* (9), he is reported as saying:

> I think that case also establishes the fact that just as it is not sufficient to bring it within the doctrine to prove the two men are making money for the same master, E equally it is not necessary to prove that the work that they were doing was of a similar or even identical character.

This is accurate, but of course it must be understood in relation to the facts of any particular case, and I should think that it would be right to say that it could not be disputed that, if two men were doing together similar or identical work, they would be regarded in law as being within F the doctrine of common employment.

In my judgment, Jones and the deceased man Radcliffe were not only in the service of a common employer at the time Radcliffe received his injuries, but were also engaged in a common work, and they are therefore brought within the exception to liability which has been established G by the doctrine of common employment. For these reasons, I think that we must allow this appeal with costs.

SCOTT, L.J.: I concur with the judgment of GREER, L.J.

LUXMOORE, J.: I agree. H

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Berrymans*, agents for *Weightman, Pedder & Co.*, Liverpool (for the appellants); *Silverman, Jordan & Co.*, agents for *Silverman & Livermore*, Liverpool (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

NEWSOME *v.* DARTON URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Atkinson, J.), **December 20, 1937.**]

Highways—Repair by highway authority—Non-feasance—Excavation for drainage purposes—Accident due to subsequent subsidence three years after work completed.

A In July, 1933, the defendants had made a trench in a highway for the purpose of executing certain drainage work. The excavation was filled in, and in 1935, when the surface was tar-sprayed and chippings were rolled in with a steam-roller, the surface was said to be level. In 1936, a depression had formed at the place where the work had been done, and the jury found that the highway at this place was dangerous B to those using it with due care. The jury also found that, although the original work was executed without negligence, the dangerous condition was due to the work of the defendants, and that the defendants were negligent in not discovering and taking steps to remedy the danger. The plaintiff, having been thrown from his bicycle and injured by reason of the subsidence of the road at the place in question, brought an action against the defendants as the highway authority responsible C for the repair of the road :—

HELD : there was a duty on the defendants to make good the inevitable subsidence resulting from their work in 1933, and they were negligent in not discovering, and in not taking steps to remedy, the danger.

[EDITORIAL NOTE. In this case the principle that a highway authority is not D liable for non-feasance but is liable for misfeasance is again discussed. It must be noted that there was a finding by the jury that the subsidence was due to the excavations made by the highway authority, and, once this is established, the case seems to be governed by the decision in *Shoreditch Corpn.* v. *Bull* (4). If the authority interferes with the structure of the road, then the operation of restoring it to the condition in which it was before such interference includes the remedying E of a subsequent subsidence. This is held to be so in the present case although it was not established that there was any subsidence until after the expiration of two years from the date of the excavation, and the accident complained of occurred as long as three years after the excavation.

AS TO NON-FEASANCE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 332-337, para. 455 ; and FOR CASES, see DIGEST, Vol. 26, pp. 398-409, Nos. 1239-1298.]

F

Cases referred to :

(1) *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588 ; 36 Digest 175, *206* ; 63 L.J. Ch. 36 ; 69 L.T. 361.

(2) *Skilton* v. *Epsom & Ewell Urban District Council*, [1937] 1 K.B. 112 ; [1936] 2 All E.R. 50 ; Digest Supp. ; 154 L.T. 700.

G (3) *Bathurst Borough* v. *Macpherson* (1879), 4 App. Cas. 256 ; 26 Digest 405, *1274* ; 48 L.J.P.C. 61 ; 41 L.T. 778.

(4) *Shoreditch Corpn.* v. *Bull* (1904), 90 L.T. 210 ; 26 Digest 412, *1320* ; *affg.* S.C. (1902), 67 J.P. 37.

(5) *McClelland* v. *Manchester Corpn.*, [1912] 1 K.B. 118 ; 38 Digest 129, *948* ; 81 L.J.K.B. 98 ; 105 L.T. 707.

H (6) *Sydney Municipal Council* v. *Bourke*, [1895] A.C. 433 ; 26 Digest 400, *1254* ; 64 L.J.P.C. 140 ; 72 L.T. 605.

(7) *A.-G. (at the relation of Ormerod Taylor & Son, Ltd.) and Ormerod Taylor & Son, Ltd.* v. *Todmorden Borough Council*, [1937] 4 All E.R. 588 ; Digest Supp.

(8) *Papworth* v. *Battersea Corpn. (No. 2)*, [1916] 1 K.B. 583 ; 26 Digest 412, *1319* ; 85 L.J.K.B. 746 ; 114 L.T. 340.

(9) *Colquhoun* v. *Bruce County Council* (1910), 29 N.Z.L.R. 442; 26 Digest 398, case *1240x*.

(10) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72; 26 Digest 410, *1308*; 68 L.J.Q.B. 704; 80 L.T. 615.

(11) *Hurst* v. *Taylor* (1885), 14 Q.B.D. 918; 26 Digest 477, *1897*; *sub nom. Hirst* v. *Taylor*, 54 L.J.Q.B. 310.

Action for damages for personal injuries. The plaintiff was thrown from his bicycle in consequence of a hole which was part of a subsidence in a street in Darton in the West Riding of the county of Yorkshire, the defendants being the highway authority responsible for the repair of the street.

Herbert Malone for the plaintiff.

G. H. B. Streatfeild for the defendants.

Streatfeild: On the jury's findings, the defendants are entitled to judgment. They have found that there was no negligence in the way the work was done originally. Any defect subsequently developing cannot amount to more than non-feasance. The law is well settled that for this the highway authority is not liable. [Counsel referred to *A.-G.* (*at the relation of Ormerod Taylor & Son, Ltd.*) *and Ormerod Taylor & Son, Ltd.* v. *Todmorden Borough Council* (7), *McClelland* v. *Manchester Corpn.* (5), *Papworth* v. *Battersea Corpn.* (8), and *Colquhoun* v. *Bruce County Council* (9).]

Malone: Once the defendants dug the trench in the road, any sinking which occurred, however long afterwards, at that place, must be construed as misfeasance. [Counsel referred to *Shoreditch Corpn.* v. *Bull* (4), *Penny* v. *Wimbledon Urban Council* (10), and *Hurst* v. *Taylor* (11).] The *Todmorden Borough Council* case (7) does not touch the present case. Here the jury have found that the road was in a dangerous condition.

Atkinson, J.: This is an action for personal injuries caused by the plaintiff being thrown from his bicycle in consequence of a hole, which was part of a subsidence in some street in Darton, in the West Riding of the county of Yorkshire. There is no dispute about certain of the facts. At the end of 1933, the defendants caused a trench to be dug half-way across a road, for the purpose of connecting the drains of some new houses with the sewer running down the centre of the road. The work was done by subcontractors, but no point was made of that. The contractors did their work, and it was passed by the defendants. I think that once or twice the subsidence which followed the falling in of the trench was made good, and there was evidence that in Aug., 1935, the road was tar-sprayed, and that chippings were rolled into it with a steam-roller. It was said on behalf of the defendants that then the trench was level. But there is no doubt that it soon ceased to be level, and there was ample evidence to support the finding that, by the time of this accident, which was in Aug., 1936, this subsidence, ending in a hole, was dangerous to the public. At any rate, that was the view that the jury took in answer to the first question: "Was the trench dangerous to those using the highway with due care ?" The answer was: "Yes." Then the second question was: "Was that condition the result of work done by or on behalf of the defendants ?" The answer to that also was: "Yes." Then the next question was: "Was the original work done negligently ?" To that the answer was: "No." The fourth A question was: "Were the defendants negligent in not discovering and taking steps to remedy the danger ?" To that the answer was: "Yes."

Now, on those findings, the plaintiff asks for judgment, and the case is put in two ways. It is said, first, that this is a perfectly ordinary, straightforward case of a nuisance, which has caused damage to the B plaintiff, and that one need not worry about whether that nuisance was caused negligently or not. Alternatively, it is said that there is a case on the finding of negligence.

Normally, of course, a nuisance is no branch of the law of negligence, and it is no defence that all possible care and skill have been used to C prevent the reparation from amounting to a nuisance. LINDLEY, L.J., in *Rapier* v. *London Tramways Co.* (1), said, at p. 599:

> At common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it.

D The plaintiff says that it is a nuisance, and that that nuisance was the result of work done by the defendants, and there is an end of it. Normally, I gather, the defendants would agree that that is a perfectly sound argument, but they say that here there is an exception, and that this nuisance, if it is one for which they are responsible, at any rate was E there as a result of their failure to repair. They rely upon a passage in the judgment of SLESSER, L.J., in *Skilton* v. *Epsom and Ewell Urban District Council* (2). That was the case, it will be remembered, of the stud which had been fixed in the road, and which was not fixed properly, or which, at any rate, if fixed properly, had become loose. F SLESSER, L.J., says, at p. 53:

> The question which has to be decided by the court is this, essentially. Have the defects caused a nuisance in the highway ? If they have caused a nuisance in the highway, it may be that they are responsible to that individual who has been injured as a consequence of that nuisance; but there is an important exception to the general principle of liability for nuisance in an action. In the case of the maintenance of highways, for a very long time indeed—in fact the law knows no G view to the contrary—it has been held that a local authority who are the highway authority are not responsible for the mere non-repair of the highway.

Here the argument is this: If this be a nuisance, it is a nuisance merely because of failure to repair the highway, and for this failure they are not responsible. I do not propose to consider all the cases bearing on this H question of what is non-repair and what is not, but I think that it is necessary to refer to only three cases. It seems to be established beyond all doubt as a proposition that, if the nuisance complained of is there as a result of something which has been done by the defendants, then this exception does not apply. In this case, I need not consider the question of whether the act done was done by the defendants as the highway authority or as the drainage authority. Mr. Streatfeild accepts what was alleged in the statement of claim, that the work was done as the highway authority, but he says that it makes no difference in which capacity it was done.

The first case to which I would like to refer is *Bathurst Borough* v. *Macpherson* (3). There the facts were not unlike the facts in this case. The plaintiff, while riding a horse along a road, had a fall, because his horse put its foot into a hole in the road. The claim was based on negligence in constructing the street, and on negligence in keeping and maintaining the street, and in not repairing the drain, gutter, or sewer in the street. Apparently there the local authority had constructed a barrel-drain into which ran an open drain. The brickwork of the drain had broken, and, not having been repaired, a hole was caused, into which the plaintiff's horse fell. The Chief Justice, in directing the jury, said that the defendants:

> were not liable for the result of any mere non-feasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance, but if they constructed the sewer properly in the first instance, and it became defective afterwards, they were not bound to repair it; and further, that if the defective state in which the drain was arose from the operation of the weather or wear and tear, it having been properly constructed originally, they were not liable.

Well, there is Mr. Streatfeild's argument really put in a nutshell. On a motion for a new trial, it was held, on the second part of the direction, that it was a misdirection, that the drain had been made by the defendants, and that:

> the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff who had sustained direct and particular damage from their breach of duty.

SIR BARNES PEACOCK says, at p. 265:

> The question upon these facts is, whether the municipality having constructed the barrel-drain was not bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. Having, under the statute, the care, construction, and management of the roads and streets, the construction of the barrel-drain by the appellants was lawful; and the care and management of the roads being vested in them, the drain was in their control, and they had full power to repair or otherwise deal with it. Their Lordships are of opinion that, under these circumstances, the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it.

That seems to me to be very much in point.

Then there is *Shoreditch Corpn.* v. *Bull* (4), which is again a decision of the House of Lords. There a trench had been dug along a road for the purpose of laying a sewer. It was filled in, and the road was opened for traffic:

> About a week afterwards the respondent was driving along the road in a cab at night. The driver found that the part of the road where the trench had been

> opened was soft, and crossed to the other side, and ran into a heap of rubbish, with the result that the cab was overturned and the respondent was injured. . . . The jury found that the part of the road where the trench had been opened had been properly filled in, but had been rendered soft by subsequent rain, and was dangerous to traffic at the time of the accident.

There is no finding of negligence there. It was merely that there was A something which had been properly done, but it had become soft and was dangerous to traffic at the time of the accident. In other words, it was merely that it was a nuisance. LORD HALSBURY really deals with the argument that has been put in this case. He says, at p. 211:

> It is enough for me to say that the person sued was the person who interfered B in the first instance with the ordinary structure and normal condition of the road and that was an act—not an omission to do an act but an act—and until the road was restored in its entirety to the proper and normal condition so that it could be properly and without undue risk traversed by the public at large, it seems to me that it would be idle to say that you could put your finger upon any particular point of time and say that the liability of the sewer authority began then and ended then, and then it was handed over to an authority which is not responsible for C nonfeasance, and if that authority did nothing nobody is responsible at all. That is a process of reasoning, to which I for one will not assent. The moment the structure of the road is interfered with, and it comes within the ambit of the operation commenced by the person who is entitled to interfere with the structure of the road, then, until that road is restored into the condition in which it was before that alteration of its structure began, it seems to me the person who interfered with it is responsible for a misfeasance.

D Then the final words of the opinion of LORD LINDLEY are, at p. 212:

> They first began by putting it out of a proper state of repair, and they never put it back into a proper state of repair.

I think that everything said there applies to this case. Here the defendants had a perfectly safe and normal road. They interfered with E it; they dug a trench, and laid a drain. That road has never been restored to its original condition. It has been a road with a drain running across it underneath, over which the ground has never become set and firm. The evidence was that subsidence was no evidence of bad work in the filling in, but that subsidence was inevitable. Various F reasons were given. I was told how the water will accumulate and run along the pipes that have been laid, and in that way may cause subsidence for years, and it was because of that that the jury found that the work had been done properly. In other words, if my memory serves me aright, I suggested to them that, if they accepted this evidence about G subsidence being inevitable, then there was no evidence that the work had been badly done, because that really was the only evidence on which there was to go. However, one cannot have it both ways. If subsidence is no evidence of bad work, and if they accepted that evidence, they must also have accepted the evidence of some of the witnesses that H it was inevitable, and that it was something which you are bound to foresee, and with which, when you foresee it, you deal. In other words, until any chance of subsidence has disappeared, until the road has been made up for some time, until it has reached a point at which absolute stability has been achieved, then the original state of things has not been restored. To quote LORD HALSBURY again, it has not been "restored into the condition in which it was before that alteration of its structure began." It seems to me that it is all part and parcel of what they did. They began the work, and that work would not be properly finished until the subsidences, which were inevitable from time to time, had been filled in, and the road had finally been made good.

To go back again to *Skilton's* case (2), the very last paragraph in the judgment of SLESSER, L.J., is absolutely in point. I see that *McClelland* v. *Manchester Corporation* (5), which has been relied on here, was cited to the court and referred to. After he had considered the cases, SLESSER, L.J., ended in this way, at p. 59: A

> . . . it is a case . . . of bringing a nuisance upon the highway, in which case the authority are responsible if that which by its nature may be dangerous is by want of proper maintenance and by want of proper reparation brought into such a dangerous condition as to cause injury to a passer-by on the highway. B

Every word there applies here. They have brought a trench to this road, and they have put pipes at the bottom of it, some drains of one sort or another. The evidence was clear that by its nature it would be dangerous if there were want of proper maintenance and want of proper reparation. C

ROMER, L.J., deals with the point in exactly the same way at p. 59:

> . . . I think the defendants have been rightly made liable for the damage caused to the plaintiff, and for this reason, that they have done something on the highway not for the purpose of maintaining it as a highway but for some totally different purposes, and what they did had at the time the injury was caused to the plaintiff become and resulted in a nuisance to the highway, and for such a nuisance the defendants were, in my opinion, properly made liable. . . . "The defendants had created a nuisance [quoting from *Sydney Municipal Council* v. *Bourke* (6)]. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous." D E

I think that I have said enough to indicate the reasons why I think that in this case the defendants are liable on the first two findings. As to the negligence, I think that there was cast upon the defendants a duty to make good these inevitable subsidences resulting from their work, and, if there was a duty, there was ample evidence to support the jury's finding that they were negligent in not discovering, and in not taking steps to remedy, the danger. Of course, there can be no negligence if there is no duty, but perhaps this is not carrying the case much further. In my view, it can be put either way, and I think that, having done this work, which would have these inevitable consequences, there was a duty to maintain and repair, and that there was negligence in failing so to do. Therefore, I think that on that ground, too, the defendants are liable. I therefore give judgment for the plaintiff for £1,068. F G H

Judgment for the plaintiff for £1,068, *and costs.*

Solicitors: *Kingsley Wood, Williams & Murphy* (for the plaintiff); *Corbin, Greener & Cook*, agents for *Dibb & Clegg*, Barnsley (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re HOME GROWN SUGAR, LTD.

[CHANCERY DIVISION (Simonds, J.), **November 29, December 7, 1937.**]

Company—Shares allotted to a Minister of the Crown—No interest on such shares payable during " establishment period "—Winding up of company—Provision for payment to Minister of a sum equivalent to amount of A *dividend received by other shareholders—Whether net amount received by shareholders, or gross amount without deduction of income tax.*

On the formation of a company, half the ordinary shares were allotted to the Minister of Agriculture and Fisheries. The articles provided that such shares were not entitled to rank for ordinary dividend or interest during the " establishment period," which period was to be B the first ten years after the incorporation of the company. It was further provided that in the event of a winding up of the company the surplus assets should be applied (after repayment of capital) " in payment to the Minister . . . in respect of each share held by the Minister . . . of a sum equivalent to the amount of dividend received on a share of the company issued originally to the public . . . less the amount of dividend received on such share held by the Minister " :—

C HELD : the amount payable to the Minister in respect of each share was the actual amount which had been received by any other shareholder as dividends. As income tax had been deducted, such amount was the net amount after deduction of tax ; but if the company had paid the full amount of the dividends, then it would have been such sum without deduction of tax.

D [**EDITORIAL NOTE.** The importance of the present case lies in the fact that, when the government for some special reason aid a particular industry or section of the public, such aid is often given by the formation of a company the capital of which is in part subscribed from public funds. The construction of the necessary articles to secure the position of the government upon a winding up is therefore of general importance.

E AS TO PAYMENT OF DIVIDENDS ON A WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, pp. 700, 701, para. 1168 ; and FOR CASES, see DIGEST, Vol. 10, pp. 1002-1008, Nos. 6961-6991.]

Cases referred to :

(1) *Re Dominion Tar & Chemical Co., Ltd.*, [1929] 2 Ch. 387 ; Digest Supp. ; F 98 L.J.Ch. 448 ; 142 L.T. 15.

(2) *Inland Revenue Comrs.* v. *Burrell*, [1924] 2 K.B. 52 ; 28 Digest 108, *665* ; 93 L.J.K.B. 709 ; 131 L.T. 727 ; 9 Tax Cas. 27.

(3) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171 ; 28 Digest 107, *663* ; 90 L.J.K.B. 1028 ; 125 L.T. 497 ; 8 Tax Cas. 101.

G (4) *Neumann* v. *Inland Revenue Comrs.*, [1934] A.C. 215 ; Digest Supp. ; 103 L.J.K.B. 210 ; 150 L.T. 481 ; 18 Tax Cas. 332.

SUMMONS by the liquidators of the company, in voluntary liquidation, to determine the respective rights of the Minister of Agriculture and Fisheries, as the holder of certain shares of the company, and of the H other shareholders, of whom the Midland Machine Trust, Ltd., was a representative.

C. V. Rawlence for the liquidators.

H. O. Danckwerts for the Minister of Agriculture and Fisheries.

Fergus D. Morton, K.C., and *Terence Donovan* for Midland Machine Trust, Ltd.

SIMONDS, J.: The question here arises in this way. The company was incorporated on Nov. 13, 1920, to cultivate sugar beet and to acquire and develop all or any part of the assets and undertaking of the British Sugar Beet Growers Society, Ltd. On Mar. 3, 1920, an agreement was, in accordance with the articles of association of the company, made between the Minister and the company, whereby the Minister agreed to A apply for a number of ordinary shares of the company equivalent to the number of ordinary shares allotted by the company to the public, and to pay for such shares in the same way as the public paid for the shares allotted to them. His liability was, however, limited to 250,000 shares. He further entered into certain other obligations in regard to B the provision of certain sums, and the issue of so-called profit notes therefor, which it is not material in these proceedings to consider. The Minister, pursuant to this agreement, applied for and was allotted, and duly paid for, 250,000 ordinary shares of £1 each of the company. The shares so issued to him were, under the articles of association of the C company, subject to certain incidents of a special character, by which they were distinguished from the other ordinary shares of the company. Art. 4 of the articles of association provided that the shares which should "be subscribed for and allotted to the Minister or his nominees" should, so long as they should be held by the Minister or his nominees, "but D no longer," be subject to certain restrictions. They were not to be transferred to any person other than the nominee of the Minister. They were not to confer on the holders a right to attend or vote at any general meeting, except under special circumstances, which are stated. In particular, they were not: E

> except as provided as regards deferred dividend, in the event of transfer at the call of the directors under the next following article hereof be entitled to rank for or receive any dividend or interest during the establishment period.

The establishment period was by the articles defined as being the period of 10 years between the date of the incorporation of the company and F Apr. 1, 1930, so that the period between the date of the incorporation of the company and Apr. 1, 1921, shall be treated as the first year of the establishment period. Then the same article further provides that, after the establishment period, the shares to which I have referred shall be entitled to dividend at the rate of 5 per cent. per annum, "as herein- G after provided." Art. 5 further provides that:

> The directors shall be entitled at any time or times, by notice in writing, to call upon the Minister to sell all or any of the shares referred to in the preceding article to any person or persons nominated by the directors as transferee or transferees thereof at their nominal par value and the Minister shall thereupon transfer or procure transfer of the share or shares affected by any such notice to such person or persons. H

Then there was a proviso to that article which has some little bearing. It was a proviso that:

> In the event of the directors calling for a transfer of all or any of such shares under this clause the company shall, upon or before the completion of the transfer, pay to the Minister out of its reserve fund, or out of any other moneys in its hands,

> available for distribution as dividend, the following sum by way of deferred dividend, such sum to be in addition to the par value of the share or shares to be paid by the proposing purchaser thereof as hereinbefore provided, namely :—A sum equivalent to dividend or interest (less income tax) at the rate of 5 per cent. per annum, calculated from the date of the allotment of the share or shares to the date of transfer, but in the event of such transfer taking place after the termination of the establishment period, less any sum or sums which may have been paid by way of dividend on such shares, subsequent to such termination under the provisions in that behalf hereinafter contained.

It is to be noticed that the words "less any sum or sums which may have been paid by way of dividend on such shares" must refer to the net sums actually paid by the company and received by the Minister, for they are sums which are to be deducted from a sum calculated as the net sum—that is, after deduction of income tax.

Then art. 8 provides for the application during the establishment period of the net profits available for distribution. It is sufficient to say that during this period no dividend was to be paid in respect of the shares held by the Minister. Art. 9 provides for the application in the establishment period of the net profits available for distribution so long as any shares are held by the Minister, or any profit notes are outstanding. Here it is sufficient to say that during this period the Minister's shares were on exactly the same footing as were the other shares of the company.

Art. 10 is the article which has given rise to these proceedings. It provides :

> In the event of the winding up of the company while any shares shall continue to be held by the Minister or his nominees as aforesaid or there shall be any profit notes outstanding, the surplus assets of the company available for distribution after payment of outstanding debts and liabilities shall be divided as follows . . .

First, in repayment of the amount paid up on all the issued shares and the nominal amount of any outstanding profit notes. Then :

> Secondly, in payment to the Minister or his nominees (*a*) in respect of each share held by the Minister or his nominees under the provision aforesaid of a sum equivalent to the amount of dividend received on a share of the company issued originally to the public on the first general allotment of shares less the amount of dividend received on such share held by the Minister or his nominees, and (*b*) of any unpaid interest on profit notes then outstanding calculated from the date of the payment in respect of which they were issued. Thirdly, the balance, if any, shall be divided rateably and *pari passu* between the holders of all such issued shares of the company as aforesaid in proportion to the capital paid up thereon.

The company having, as I have said, gone into voluntary liquidation, and there being surplus assets available after making the payments which have first to be made, there has arisen the question which is thus accurately formulated in the originating summons :

> Whether the sum payable under paragraph "Secondly" of art. 10 in respect of each share held by the Minister of Agriculture and Fisheries or his nominees under the provision therein referred to is a sum equivalent to the net amount in respect of dividends actually received by the shareholders on a share of the company issued originally to the public on the first general allotment of shares less the amount of dividends received on such share held by the said Minister or his nominee or a sum equivalent to the net amount so actually received (less the amount of dividends received as last aforesaid) plus the income tax deducted from the gross dividends in respect of which payment of the same was made.

The latter alternative is put forward by the Minister, the former by the other shareholders, as the true construction.

The question is purely one of construction of particular words. I get little assistance from such cases as *Re Dominion Tar & Chemical Co., Ltd.* (1), where other and different words had to be construed. The question here is whether in their context the words "the amount of dividend received," which twice occur in the passage under consideration, and must bear the same meaning on both occasions, mean (*a*) the sums actually received by the shareholders from the company—that is, the amount of dividend after tax has been deducted—or (*b*) the sums which the shareholders would have received by way of dividend from the company if the same dividend had been declared and no tax had been deducted. In the consideration of those alternatives, I cannot disregard the fact that the obvious purpose of this provision is to equate the shares of the Minister with the shares of the other shareholders, and to make up to him what he has lost by the payment to others and by the withholding from him of dividends during the establishment period. If, however, I adopt the view for which his counsel has contended, I shall place him in a position more favourable than that of the other shareholders, for it is clear, on the authority of such cases as *Inland Revenue Comrs.* v. *Burrell* (2), that no income tax would be payable in respect of sums so received by him in the winding up. Apart, however, from this consideration, it appears to me reasonably clear that the amount of dividend received by a shareholder within the meaning of this clause is that sum which he actually receives after the company has exercised the right to deduct the appropriate amount of tax, which is given to it by the Income Tax Act, 1918, All Schedules Rules, r. 20.

It is no doubt true that, for other statutory purposes, the whole of the dividend is to be regarded as the shareholder's income, notwithstanding the fact that he actually receives only part of it. So also, it is true that, if, by a dividend being declared, the company deducts from the dividend the appropriate amount of tax which it has previously paid, such payment may be said to operate in relief of the shareholder: see the words of Viscount Cave in *Inland Revenue Comrs.* v. *Blott* (3), at p. 201, and those of Lord Wright in *Neumann* v. *Inland Revenue Comrs.* (4), at p. 236. But it does not, in my view, follow that the shareholder is, for the purpose of such an article as this, to be regarded as receiving what he does not in fact receive. Such a contention would be weightier if the shareholder, being entitled to receive the whole dividend, directed the company to pay the appropriate part of it as income tax on his behalf. But that is not the position. Indeed, so far is it from being the position that the company itself decides whether it will or will not deduct tax from dividend, and will be guided in the amount of dividend which it declares by its decision to deduct or not to deduct tax. It was suggested that, since in the proper case a shareholder is entitled to recover back from the Crown the tax deducted from his dividend, the whole dividend, and not merely the dividend less tax, should in every case be regarded as "the amount of dividend" received by the shareholder. I cannot accept this view, for I think that the words in question indicate a common standard, and I must therefore reject an incident which affects certain shareholders only.

In my judgment, the amount of dividend received by the shareholder on his shares within the meaning of this clause is the same thing as the A amount of dividend which the company pays to the shareholder, and does not include the amount which the company does not pay to the shareholder, but withholds from him. The declaration will be framed accordingly.

Solicitors: *Chas. Rogers, Sons & Abbott* (for the liquidators and the B Midland Machine Trust, Ltd.); *Official Solicitor* (for the Minister of Agriculture and Fisheries).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

C COMMERCIAL AIR HIRE, LTD. *v.* WRIGHTWAYS, LTD.

[King's Bench Division (du Parcq, J.), **November 10, 11, 12, 15, 16, 1937.**]

D *Contract—Illegality—Aircraft—Unairworthiness—Agreement to deliver and to take delivery of aircraft to be flown in unairworthy condition.*

The plaintiffs purchased an aeroplane from the defendants, the purchase being in fact made on behalf of the Spanish government who were at the time engaged in a civil war. For this purpose certain modifications were made in the aeroplane, and, as there was an immediate prospect of an embargo being placed upon the delivery of aircraft E to Spain, these modifications were hurriedly made, and the aeroplane left for Spain without such modifications being approved by the inspectors of the Air Ministry as required by the regulations. It was found that the plaintiffs were privy to the breach of the regulations:—

Held: the contract was unenforceable as being illegal, since both parties intended that it should be flown without the modifications being approved by the proper authority.

F **[EDITORIAL NOTE.** The contract in the present case amounted to one to supply and deliver an aeroplane that was known by both parties to be unairworthy. To fly such craft is a breach of the statutory regulations, and the contract was therefore held to be illegal and unenforceable by either party.

As to Aircraft, see HALSBURY, Supp., Street and Aerial Traffic, para. 712; G and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 260a-260f.]

Action for damages for breach of warranty upon the sale of an aeroplane. The facts are fully stated in the judgment, but the case is only reported upon the question of illegality.

Cyril Salmon and *Douglas C. L. Potter* for the plaintiffs.

H *Gilbert H. Beyfus, K.C.*, and *Ronald Armstrong-Jones* for the defendants.

du Parcq, J.: On Aug. 12, a contract was entered into between Mr. Stebbing, who, it is said, was acting as agent for the plaintiffs, and the defendants, for the sale of an aeroplane, a de Haviland 84 Dragon, at the price of £2,300. The money was paid, and the aeroplane was delivered. The action is brought for breach of warranty, and damages are claimed. Before I can say, not only that there has been a breach of contract, but also that damages ought to be awarded, I have, in the circumstances of this case, to consider the question of whether the contract made was one which this court ought to enforce. There is no plea here by the defendant that the contract was illegal, or that the purposes for which the contract is made were illegal, but it is, of course, clear law that, even though the defendant does not take the point that the contract is illegal, and therefore against public policy, the court must take it and consider it, and, if necessary, if the point is a good one, send the parties away without further considering their claim, or, at any rate, without awarding damages to a person who comes before the court as one who either broke the law or did his best to break the law.

It is necessary in this case to say a little about the surrounding circumstances. On Aug. 12, 1936, there was, as there still is, civil war in Spain. At that date, there was no illegality at all about supplying aeroplanes to the Spanish government. Spain was, as Spain still is, a friendly country. The Spanish ambassador was, and still is, at the court of St. James's, and, whatever may be said as to the question whether, at the date in question, it was lawful to provide aeroplanes to those who had taken up arms against the Spanish government, it is plain, and nobody doubts it, that it was lawful to supply aeroplanes to the Spanish government. No question arises about that. It was, however, rumoured, and had been so rumoured for some time before Aug. 12, that the government might take steps to make it unlawful to send aeroplanes, among other things, to the Spanish government. A good trade was being done, and a perfectly legitimate trade was being done, if it was carried out according to law, in supplying aeroplanes to the government of Spain. There was a demand for them. The demand, at one time, at any rate, was in excess of the supply, and the price of aeroplanes suitable for use in the war in Spain had gone to a very high figure as compared with the usual market price. I have been dealing here with an aeroplane which, in the ordinary course, would be sold at something like £1,500. In this particular case there was a contract to sell it for £2,500, as has been proved before me. I gather—in fact it was stated in evidence—that the ultimate contract by which the Spanish government was to pay the purchase price was for a figure even in excess of £3,000. Naturally enough, as these rumours were in existence, and as it was feared by some that the embargo, as it has been called, might be put in force at any moment, there was anxiety on the part of some people to provide themselves with aeroplanes at the earliest possible moment, and to get them to Spain without delay. It is impossible to get an aeroplane out of England, if the aeroplane is to fly and not be transported by land and sea, without complying with the regulations in force in this country. One of the regulations is:

> If modifications, including changes of equipment, which affect the safety of the aircraft are carried out to an aircraft in respect of which a certificate of airworthiness

is in force, then until the modifications have been approved the aircraft shall not fly except in so far as under the order it might fly if it had no certificate of airworthiness.

There are certain cases in which an aeroplane may fly without a certificate of airworthiness, but I need not discuss them because they are irrelevant A to this case. The plaintiff company had entered into a contract to supply an aeroplane to a company called the Union Founders Trust. A gentleman named Mr. Collins, representing that company, gave evidence before me. They agreed to buy a particular aeroplane, G-ACKU, to be delivered at Croydon, and Mr. Collins, or his company in turn, had sold B that aeroplane, so he told me, to the Spanish government through some accredited agents of the Spanish government for a price of over £3,000. Mr. Collins' understanding of the matter was that the machine was to fly from Croydon to Barcelona without a stop, or, at any rate, to Spain without a stop. It was well known by those representing the plaintiff C company that there would be difficulty about getting this machine from Wrightways, Ltd. The defendants were the owners of the aeroplane G-ACKU, and, in order to carry out the contract which the plaintiffs made with the Union Founders Trust, it was necessary that they should be the owners of G-ACKU, which had been employed for some time D carrying newspapers to Paris. It was not capable of remaining in the air for as long as would be required to fly to Spain, and, if it was to be of any use to the Union Founders Trust, or to those who were going to sell to the Union Founders Trust, it was necessary that alterations should be made in it. It was necessary, also, that everything should be done E quickly, because of the need to escape the embargo which was hanging over the heads of these negotiators, and to get it off to Spain as soon as possible. This aeroplane G-ACKU, having been used for commercial purposes, had never gone into the air without what is called a day-to-day certificate from the responsible engineer employed by its owners. The F log-book which showed the condition it was in, showed whatever alterations had been made, and showed what repairs had been effected, had been properly kept, and no doubt anybody would assume that it was fit to fly. Indeed, it had been flying up to a day or two before the day on which it changed hands.

G It is of importance here to say what the contract was, and the best way to start, I think, is to see what the contract which the plaintiffs have pleaded here is. They put it in this way. After setting out the oral agreement to sell and deliver this aeroplane at the price of £2,300, the statement of claim goes on to allege an express or implied term or condition and a warranty:

H that the condition and equipment of the said aeroplane was accurately described in the said aeroplane's log-book and that the defendants should deliver the said aeroplane under the said agreement in the same condition and with the same equipment (subject to the installation of a special oil-fuelling equipment and the removal of the wireless apparatus) as described in the said log-book and in an airworthy condition.

So that it was a term of the contract that a special oil-fuelling equipment should be installed, according to the way in which the contract is pleaded by the plaintiffs. Then it is said in the next paragraph that the plaintiffs —meaning, of course, Mr. Stebbing on their behalf :

> made known to the defendants that the plaintiffs required the same for the purpose of the same being immediately re-sold at a profit to a certain customer of the plaintiffs' and flown to Barcelona in Spain.

The plaintiffs, who were buying this machine, knew a good deal about it. They knew, probably, something of its history, and of course they knew that, although it had been in use for some time, it must be regarded as airworthy, because of the daily certificates which it had had. But anybody must know, too, that, where a machine has been used for some time, and where it is not so very far off the date when it is likely to be overhauled and repaired, it may be getting towards the end of its working life—apart from repairing, which may give it a new lease of life. I do not think that this was a machine at all in what one would describe as excellent condition. The cowlings had certainly been very much repaired. The instrument panel, I think, in all probability was not properly fitted, probably because of the hurry and the rush in which things were done. I think that that would have been a matter which would not have presented much difficulty, and I cannot believe that it could not have been put right at Paris. With regard to the propellers, undoubtedly there was an implied warranty that they should be reasonably fit for flight, and I think, with some doubt, that probably they were not. I think that probably the pair which was put on was an old pair, and that the plaintiffs were entitled to ask for something better.

I am bound to come to the conclusion here that the purpose of this contract was to get delivered an aeroplane which would be flown out of the country in defiance of the law—that is to say, in breach of regulations. I want to make it quite clear again that its destination has nothing to do with that. It was perfectly lawful to take an aeroplane to Barcelona, but it was unlawful in England to buy an aeroplane which it was intended should be flown—and contemplated by both parties that it would be flown—without any attempt being made to get approval for alterations which everybody knew affected the safety of the machine, and, indeed, in circumstances in which nobody intended to apply for such approval. I think that I should be doing very wrong, in such circumstances, if I allowed one of the parties to the contract—and, perhaps it may be said, the party who was most certainly to blame—to recover damages against the other. It may be said that the defendants might, at any rate, persuade themselves that possibly this aeroplane was going somewhere else, though I think that they knew quite well what the purpose of the contract was. But it is quite clear that the plaintiff company knew that what was intended was to make money as quickly as possible by hurrying the aeroplane off, ignoring the regulations of the Air Ministry. I think that I should be doing wrong, in those circumstances, if I allowed the plaintiff company to recover any damages. I understand that, although there has been this flagrant breach of regulations which were made for the safety of the public, including that of the pilots, it has not been thought fit to prosecute any of the persons concerned. The action is dismissed. There will be no costs.

Action dismissed. No costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *Joynson-Hicks & Co.* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

BENNET *v.* MARSHALL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **December 13, 14, 15, 1937.]**

Income Tax—Income from possessions out of the United Kingdom—Employment by foreign company—Work partly in United Kingdom—Residence in United Kingdom—Income Tax Act, 1918 (c. 40), *Sched. D, Case V, r.* 2.

The respondent, who was resident in the United Kingdom, was vice-president of a company incorporated in the United States of America. The American company was a parent company having subsidiary companies all over the world, and the respondent supervised the activities of the subsidiary companies everywhere except in the United States of America and Canada. The respondent spent about 8 weeks in each year in America, conferring with the other officers of the American company, and for some months in each year he travelled all over the world supervising the work of the subsidiary companies. There was no reason, apart from his residence, for the respondent to be in England except when in his own discretion he considered that the English subsidiary company required supervision. Payment of his salary was made throughout by payments into his banking account in Canada. The Crown contended that, as the respondent was resident in the United Kingdom and carried on an employment partly in the United Kingdom, he was chargeable to tax under Sched. E in respect of the whole of the profits of his employment, whether carried on in the United Kingdom or elsewhere, and whether remitted to the United Kingdom or not:—

HELD: the source of the respondent's income was the place where that income really came to the employee, and that place was Canada.

Decision of LAWRENCE, J., ([1937] 3 All E.R. 208) *affirmed.*

[EDITORIAL NOTE. In this case the Court of Appeal have followed the decision of the House of Lords in *Foulsham* v. *Pickles* (2). The question arising in such a case is: What is the source of the income? In the case of an employment this is either the place where the contract for payment is deemed to have a locality or the place where the payment for the employment is made. The place where the work is carried out is not the test. The test is the place where the income really comes to the employee.

AS TO CASE V, r. 2, see HALSBURY, Hailsham Edn., Vol. 17, pp. 199, 200, para. 410; and FOR CASES, see DIGEST, Vol. 28, p. 81, Nos. 446-450.]

Cases referred to:

(1) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; 28 Digest 79, *433*; 59 L.J.Q.B. 53; 61 L.T. 518; 2 Tax Cas. 490.

(2) *Foulsham* v. *Pickles*, [1925] A.C. 458; 28 Digest 25, *131*; 94 L.J.K.B. 418; 133 L.T. 5; 9 Tax Cas. 261.

(3) *London Bank of Mexico & South America* v. *Apthorpe*, [1891] 2 Q.B. 378; 28 Digest 27, *141*; 60 L.J.Q.B. 653; 65 L.T. 601; 3 Tax Cas. 143.
(4) *Mitchell* v. *Egyptian Hotels, Ltd.*, [1915] A.C. 1022; 28 Digest 26, *139*; 84 L.J.K.B. 1772; 113 L.T. 882; 6 Tax Cas. 542.

APPEAL from an order of LAWRENCE, J., dated July 29, 1937, and reported in [1937] 3 All E.R. 208, where the facts are fully stated. A

The Solicitor-General (*Sir Terence O'Connor, K.C.*,) and *R. P. Hills* for the appellant.

Cyril Radcliffe, K.C., and *J. H. Bowe* for the respondent.

SIR WILFRID GREENE, M.R.: On Aug. 31, 1933, the respondent B
was appointed vice-president in charge of overseas sales of the National Cash Register Company of Dayton, Ohio, in the United States of America. He had previously been in the employment of an English subsidiary of that company, and, during that employment, and during his employment as vice-president of the American company, his residence, as found C
by the general commissioners, was in England. His duties under the employment, the terms of which were not contained in any written agreement:

> were to supervise the sales of the products of the American company throughout the world (except the United States and Canada) whether sold direct by them or D
> through agents or through subsidiary companies.

The general commissioners found that his place of employment was at the office at Dayton, Ohio, of the American company, and he was paid from that place. At his request, payment was made to his credit in a banking account in Canada, and he drew on that account such monies E
as he from time to time required.

I need not go into the details of the facts of the case, which are fully set out in the case stated and in the judgment of the judge. It is sufficient to say that the respondent during the relevant period was resident in this country, and that a part of his duties as vice-president of the F
American company (and by that I mean a not unsubstantial part) was performed in this country. He had to visit the various countries of the world, except the United States and Canada, and supervise the sales of the company's products, and, to a certain extent (and, as I say, to a not unsubstantial extent), that task of supervision was carried out in G
this country in reference to sales here. The payment of his salary was made throughout by payments into his banking account in Canada.

The respondent was assessed under Sched. E in respect of his remuneration as vice-president for the years in question in sums which amounted, or were intended to amount, to his whole salary under that employment. H
The respondent appealed from that assessment, and the general commissioners accepted the argument of the respondent that he was not assessable under Sched. E, but was assessable under Case V of Sched. D, and that the measure of his liability was accordingly the actual amounts remitted to this country. The Crown appealed, and the judge,

LAWRENCE, J., decided in favour of the view which the commissioners had taken. The assessment in respect of the profits from employments, other than those which fall under Case V, is dealt with in the Finance Act, 1922, s. 18, which says:

> (1) Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Sched. D (other than the profits or gains chargeable under Case V of Sched. D, or under r. 7 of the Miscellaneous Rules applicable to Sched. D), shall cease to be chargeable under that schedule and shall be chargeable to tax under Sched. E, and the rules applicable to that schedule shall apply accordingly subject to the provisions of this Act.

The question, therefore, is: Does the present case fall within Case V, or does it fall within Case II? In the latter event, it will fall to be assessed under Sched. E, pursuant to sect. 18 of the Act of 1922. In the former event, it will not.

The first thing to remember in approaching this problem is that the first paragraph, numbered 1, under Sched. D, defines the subject-matter of the tax, whereas the second paragraph sets out the six different cases under which the tax is to be charged. There is not involved, therefore, any comparison between one of the cases set out in para. 2 and one of the subject-matters of taxation set out in para. 1. The comparison is a comparison between two cases—namely, Case II and Case V. The effect of these different Cases is to impose on the subject-matter of taxation six different categories, with the result that there may be matters which fall under one of the heads of charge mentioned in para. 1 which fall under different Cases in para. 2. To take an example which is connected with the subject-matter of the present appeal, para. 1 (*a*) (ii) describes as one of the subject-matters of charge the annual profits or gains arising or accruing:

> to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere.

Under that subject-matter of charge may be Cases which will fall under Case II or under Case V, according to their special facts. If the trade, profession, employment or vocation is carried on within the United Kingdom, it will fall, in the case of a profession or employment, under Case II, and, in the case of a trade, under Case I. On the other hand, if the trade, profession, employment or vocation is carried on entirely outside the United Kingdom, it will fall within Case V. The question, therefore, in the present case is: Were the annual payments received by the respondent received as income arising from possessions out of the United Kingdom, or were they received in respect of a profession or vocation under Case II? It is settled beyond the possibility of a doubt that the word "possessions" in Case V extends to cover trades, professions, employments and vocations. That was settled as long ago as the case of *Colquhoun* v. *Brooks* (1), which dealt with the case of a trade, but the reasoning in which has been held by subsequent cases to extend to professions and employments. It is not suggested that we have to deal here with a case where the Crown has an option to choose the Case under which the assessment is to be made. The argument presented on behalf of the Crown was the argument that the case did not fall within Case V, as it never suggested that it was a case which fell within both Case II and Case V. It is one or the other. As I have said, the word "possessions" in Case V has been construed, and finally construed, as covering cases of trade, profession or employment, and the argument which is put forward on behalf of the Crown may be succinctly stated thus: It is said that the only trades, professions, employments or vocations which fall within the word "possessions" in Case V are trades, professions, employments or vocations wholly carried on outside the United Kingdom. In other words, it is said that the moment you find any act done by a trader in the course of his trade, any act done by a professional man in the course of his profession, or any act done by an employee in the course of his employment, in the United Kingdom, the possession (to wit, the trade, profession or employment) cannot be described as a possession out of the United Kingdom. It is said that that proposition is to be found in the reasoning of *Colquhoun* v. *Brooks* (1), and that there is nothing in the subsequent case, *Foulsham* v. *Pickles* (2), which alters that position.

We have very carefully examined the judgments in *Colquhoun* v. *Brooks* (1), and, in my opinion, they establish, first, the proposition that the word "possessions" in Case V is referring to, and means, "sources of income," and, secondly, that among "sources of income" is a trade. As I have said, in subsequent cases where the principles of *Colquhoun* v. *Brooks* (1) were followed, it was held that professions and employments are sources of income within the meaning of that proposition. I do not wish to burden this judgment with too many references to authority, but there is a passage in the speech of LORD MACNAGHTEN in *Colquhoun* v. *Brooks* (1) which brings out quite clearly that point. LORD MACNAGHTEN says, at p. 516:

> Turning now to the "fifth case," I ask, why are not the respondent's profits and gains from his Melbourne business within the "fifth case"? What is the meaning of the term "possessions" in that "case"? The word "possessions" is not a technical word. It seems to me that it is the widest and most comprehensive word that could be used. Why, for instance, should not "possessions in Ireland" mean everything, every source of income that the person chargeable has in Ireland, whatever it may be? Why should not "profits from possessions out of Great Britain," which is to be found in Sched. G, No. XI, and recalls the expression "income out of Great Britain" in the Act of 1799, mean profits from every source of income abroad? I use the expression "source of income", because it is as a source of income that the Act contemplates and deals with property, and everything else that a person chargeable under the Act may have, and the Act itself, in sect. 52, uses the expressions "sources chargeable under the Act" and "all the sources contained in the said several schedules" as describing everything in respect of which the tax is imposed.

Following up that proposition, the question which falls to be decided in any particular case appears to me to be this: Is the source of the income which it is sought to charge a source out of the United Kingdom, or is it not? It is said, and it is said with truth, that, in the case of

Colquhoun v. *Brooks* (1), the particular source of income that was there dealt with was a trade, and a trade wholly carried on outside the United Kingdom. It is sought to limit the effect of the decision in *Colquhoun* v. *Brooks* (1) to cases where not merely a trade but professions and employments are carried on wholly out of the United Kingdom. I shall A show in a moment why, apart from reasoning and the logic of the matter, authority makes it, in my opinion, quite impossible to adopt that view of *Colquhoun* v. *Brooks* (1). But, leaving aside for the moment the authority to which I refer—namely, *Foulsham* v. *Pickles* (2)—and considering the reasoning in *Colquhoun* v. *Brooks* (1), the particular subject-B matter in that case was a trade. In respect of trade, there was a particular provision in the Income Tax Act which made it quite clear that a trade partly carried on outside the United Kingdom was not regarded as a foreign possession. Apart from that particular provision, I think it is just to observe that there is an inherent difference between a trade and C profession, on the one hand, and employment, on the other, when one is considering the essential question which is to be looked at—namely, what is the source of the income. Trades and professions are, so to speak, based on activity, either by the person carrying on the trade or by the person carrying on the profession. They are not to be attached to some D particular specific contract, and, accordingly, in the case of trades and professions, it is impossible to put one's finger on a particular contract as the source of the income. The profits of the profession and the profits of the trade come from the general state of activity of the trader or the professional man, and, having regard to the fact that trades and E professions are not to be divided up, if a doctor carries on his profession in England and abroad, one cannot treat that as being two professions. He is carrying on the one profession. Similarly, a trader who carries on a trade in England and also abroad is carrying on one trade, assuming that it is the same trade, and not a distinct trade. The fact that part F of his trade is carried on abroad does not make it a distinct trade, any more than the fact that a profession is carried on partly abroad makes it a distinct profession. The result is that, when one is inquiring into the source of income of a trade or a profession, once one finds that the trader or the professional man is carrying on a trade or profession in G this country, it is impossible to predicate of that trader that the source of his income is a source out of the United Kingdom. But in the case of employment different considerations arise. Employment arises from a contract of employment, and therefore one has what one has not in the other cases, some definite contract to which to look when inquiring into H the source of the income which it is sought to charge. I should have thought, therefore, that, in the case of employment, the contract is the first thing that must be looked at, in order to find out whether it can answer the question which is raised in any particular case of employment: Is it or is it not income derived from a source out of the United Kingdom? As I have said, I am quite unable to find in *Colquhoun* v.

Brooks (1) any rule laid down or anything in the reasoning which compels us to say, as the Crown here would have us say, that in no case where part of the activities of the employment takes place in this country can the income be said to be derived from a source out of the United Kingdom. I am quite unable to extract any such proposition either from the decision or from the reasoning in *Colquhoun* v. *Brooks* (1). But the matter does A
not rest there, because the question of the applicability of Case V to the case of employment has been considered by the House of Lords, and I accordingly turn for guidance to that decision. That was the decision in the case of *Foulsham* v. *Pickles* (2), to which I have referred. That was a case where an agent of a British company in West Africa was B
assessed under Case V. The facts regarding his employment, as they were assumed for the purpose of the decision to be, were that the whole of the work to be done under his employment was done outside the United Kingdom in West Africa, but the remuneration was payable by the company, his employer, in the United Kingdom, and was paid into C
a banking account in England on which his wife had the power of drawing. He was held to be resident in the United Kingdom, and the special commissioners held on appeal that he was properly assessed under Case V. Now, it is to be observed that in that case the Crown was supporting the assessment under Case V. In other words, they were D
maintaining that, where a man is employed entirely outside the United Kingdom, in the sense that the work to be done under his employment is done outside, and wholly outside, the United Kingdom, Case V was the Case applicable. They were maintaining, in other words, that the circumstance that the work was wholly done outside the United Kingdom E
involved the result that the source of income was outside the United Kingdom. That was the proposition which was put forward. That that is so appears quite clearly from the arguments which were put before the House on behalf of the Crown in that case. For instance, the then Solicitor-General, appearing for the Crown, said, at p. 459 : F

> The respondent's employment being carried on in West Africa was an employment carried on elsewhere than in the United Kingdom and, accordingly, is one of the sources the profits of which are chargeable as income arising from possessions out of the United Kingdom to the extent of the amount remitted to or received in the United Kingdom.

Then he says, at p. 460 : G

> In the appellant's submission the locality of the employment does not depend upon where the contract is made but upon where the employment is in fact carried on, and this employment was carried on in West Africa.

That was the argument that was presented. In my opinion, if there is one thing that that case did, it entirely negatived that proposition. It H
negatived the proposition that the locality of the employment depended upon the place where the employment was in fact carried on. Had that proposition been accepted, the result, of course, would have been that the Crown would have succeeded, and the case would have been a Case V case. Mr. Hills in his argument in this case would have had us hold

that the decision in *Colquhoun* v. *Brooks* (1), which dealt with a case of a trade—which in that case was carried on entirely outside the United Kingdom—must be taken as applying also to the case of employment, in the sense that the only case which would come under Case V would be a case where the work done under the employment was wholly done A outside the United Kingdom. That proposition of his appears to me to be completely inconsistent with the decision in *Foulsham* v. *Pickles* (2), because, had it been right, the analogy to the trading outside the United Kingdom in *Colquhoun* v. *Brooks* (1) would have been the performing of the services outside the United Kingdom in *Foulsham* v. *Pickles* (2), B and the result would have been that the Crown would have succeeded in *Foulsham* v. *Pickles* (2). As I say, I think that the decision is quite inconsistent with that argument. The actual language of the opinions in *Foulsham* v. *Pickles* (2) requires to be examined in order to see what was the reason of the decision. Now, it is perfectly fair to point out, C as was pointed out on behalf of the Crown, that the decision in that case was that the employment that was there dealt with did not fall within Case V, and it was said that it would not be legitimate to treat that case as a decision the effect of which would be to bring within Case V a different case. The decision must be examined for the purpose D of seeing, not only what was in fact decided, but also what was the reason for that decision, and, if the reasons given for that decision lead necessarily to the proposition that a particular case must be included in Case V, then the case of *Foulsham* v. *Pickles* (2) is an authority which must be followed, and followed with that result. There were concerned E in that decision five noble and learned Lords—VISCOUNT CAVE, L.C., LORD DUNEDIN, LORD ATKINSON, LORD SUMNER and LORD BUCKMASTER. Of those, only three delivered full and reasoned opinions—VISCOUNT CAVE, L.C., LORD DUNEDIN and LORD BUCKMASTER. LORD ATKINSON in terms agreed with the opinion of LORD DUNEDIN. LORD SUMNER agreed in F terms with the opinion of VISCOUNT CAVE, L.C. Whether or not there is any difference in principle between the opinion of VISCOUNT CAVE, L.C., and those of LORD DUNEDIN and LORD BUCKMASTER respectively, is a matter which requires examination, but, if there be a difference, the result will be that the only two noble and learned Lords to whom the G views of VISCOUNT CAVE, L.C., must be attributed are VISCOUNT CAVE, L.C., himself and LORD SUMNER. If there be any difference in view as to the principles applicable, then there are three members of the House who, as I shall show, take a view different from that of VISCOUNT CAVE, L.C.—assuming that, on the true construction of the opinion of VISCOUNT CAVE, H L.C., there is really any difference.

VISCOUNT CAVE, L.C., points out that the greater part of the arguments on behalf of the Crown was directed to establishing the proposition that an employment could be a possession within the meaning of Case V. He then points out that that was decided in *Colquhoun* v. *Brooks* (1) on the ground that the reasoning in *Colquhoun* v. *Brooks* (1) was just as much applicable to employment as it was applicable to trade. In the present appeal, it was sought from that observation to build up an argument to the effect that what Viscount Cave, L.C., said was that the principle to be extracted from *Colquhoun* v. *Brooks* (1) applied only to the case where all the acts under the contract of employment were carried out in this country. I venture to point out that, when the references to the opinions in *Colquhoun* v. *Brooks* (1) are looked at, it is possible to identify the very passages to which Viscount Cave, L.C., was there referring, and the references were to the passages where the question as to the meaning of "possessions" under Case V is examined by itself, and apart from anything else, to see what it means. One of the passages was the passage which I have just read from the opinion of Lord Macnaghten.

Viscount Cave, L.C., after quoting from Lord Macnaghten—who had come to the conclusion that the word "possessions" covers a trade—says, at p. 463:

> This conclusion [of Lord Macnaghten] appears to me to apply to an employment out of the United Kingdom which (like a trade) is a source of income; and I do not doubt that (to take two simple instances) a doctor residing in England and practising in France only, or a mining engineer having a residence here and wholly employed by a Spanish mining company in Spain, might be held to have a foreign possession and to be assessable under Case V.

Pausing there for a moment, the fact that, in the case of an employment, the example chosen by Viscount Cave, L.C., is an example where the employee is wholly employed abroad, is relied upon in support of an argument that Viscount Cave, L.C., was intending to lay down the proposition that, in the case of employment, all the employment—by which is meant the acts done under the contract of employment by the employee—must be out of the United Kingdom. The circumstance that he chooses that example does not appear to me to warrant any such conclusion as to the meaning of his language. He goes on, at p. 463:

> But assuming this to be so, it does not follow that the appellant is entitled to succeed in his appeal. For that purpose it is necessary for him to show that the respondent's employment was wholly out of the United Kingdom, and that (to use Lord Macnaghten's expression) the whole source of his income was overseas; and this, in my opinion, he has not shown.

Pausing there for a moment, the language of Viscount Cave, L.C., there is, I think, susceptible of two different constructions. He may have meant by that language, when he refers to employment wholly out of the United Kingdom, that all the acts done by the employee would have to be done out of the United Kingdom, or he may have used the word "employment" in the sense of "source of income," and as really meaning the same thing as that which he says in the following words—"that the whole source of his income was overseas." It is not possible to say that the language of Viscount Cave, L.C., is so clear as to leave it past doubt which of those two alternatives he meant. He proceeds, at p. 463:

> I will assume—although I feel some doubt on the point—that the respondent's services to the company were to be rendered in West Africa only, and that he had no duties to his employers while he was in England; but it remains true that the

> commission, which was the principal remuneration for his services, was, under the terms of his employment, payable in England only, and that he was precluded by the express terms of his agreement from drawing or claiming payment of that commission in the colony. In other words, while the burdens incidental to his employment were to be borne wholly or mainly abroad, the principal benefit which he was to derive from it could only be claimed in the United Kingdom. In these circumstances I do not think it can be said that his source of income was wholly outside this country, so as to bring him within Case V. A

There again I myself feel some little difficulty in determining one way or the other which of the two alternative meanings is to be placed on the language of VISCOUNT CAVE, L.C., but I am prepared to assume, for the purpose of this judgment, that VISCOUNT CAVE, L.C., meant to say B that, in his opinion, in order that income from an employment can be income from a possession out of the United Kingdom, the work done by the employee under his contract of employment, quite apart from anything else, must be performed wholly out of the United Kingdom. As I say, I am not at all satisfied that that is what VISCOUNT CAVE, L.C., C meant, but I am prepared to assume that that is what he did mean, and accordingly that VISCOUNT CAVE, L.C., and LORD SUMNER are to be taken to have held that view. But the next opinion which must be looked at is the opinion of LORD DUNEDIN, in which LORD ATKINSON concurred. LORD DUNEDIN first of all, as VISCOUNT CAVE, L.C., had done, held that D the effect of *Colquhoun* v. *Brooks* (1) had been to settle the question that an employment may be a possession out of the United Kingdom within the meaning of Case V. Then he comes to deal with the second proposition involved in the case—namely, that the possession was out of the United Kingdom in the case before him—and he says, at p. 466:

> E When, however, I come to the second proposition I find myself unable to affirm that this is income arising from a possession out of the United Kingdom. This income comes from the contract of employment made in the United Kingdom. When I say made in the United Kingdom I am not referring to the place where the signing of the contract took place. I am referring to the source of the profit which is the payment which the employers covenanted to make. This was payable and paid in London.

F Then he refers to r. 2 of Case V. Now, when that language is examined, it is, to my mind, quite impossible to hold that the source of the profit —which, after all, was the one question which the House was setting itself in that case—is affected in the mind of LORD DUNEDIN by the place where the services were performed. The problem is, as I have G said, first, to find out the source of the profit, and, secondly, to find out whether or not that source was out of the United Kingdom. When LORD DUNEDIN says: "I am referring to the source of the profit which is the payment which the employers covenanted to make," I construe that as meaning that the source of the profit was the provision in the H contract for payment. At that stage, I should interpose this: It was not suggested, either by the Solicitor-General in opening this case or by Mr. Hills, that the arrangements under which the payment was made in Canada in this case were such as to differentiate the case in any respect from the case of *Foulsham* v. *Pickles* (2) so far as regards the matter of payment. Accordingly, the matter was not dealt with by counsel on behalf of the respondent, but, in his reply, Mr. Hills did, in passing, call attention to the language of that finding. I myself am unable to see that there is any real difference, for the reason that I construe the finding as producing the effect that, whatever the original contract may have been, and whether it was silent or whether it was not silent with regard to the place of payment, the parties had agreed upon Canada as the place of payment. The result, therefore, is that the contract must be regarded, for present purposes, as a contract for payment in Canada.

Turning to the opinion of Lord Dunedin, the one thing that Lord Dunedin is quite clearly not accepting is the proposition which the Crown had put forward, that the locality of the employment depends upon where the work of the employee is in fact carried out. The place where the work is carried out is not mentioned by Lord Dunedin in that passage, nor, indeed, is it mentioned anywhere else, and it is quite clear that Lord Dunedin, in considering what is the source of the profit, did not regard that matter as a matter to which his mind should be directed. Precisely the same thing appears in the opinion of Lord Buckmaster. He also deals with the meaning of the word "possessions," and then proceeds to deal with the source of income in the case before him. He says, at p. 291:

> In the present case I do not think that the source of income was the employment of the respondent in West Africa. The source of his income was the money paid by an English company into an English bank in pursuance of an agreement for service made in this country.

Then he refers, as Lord Dunedin had referred, to r. 2 of Case V. It is perfectly true that Lord Buckmaster there refers, not only to the English character of the company, but also to the place where the agreement for service was made. I do not regard the mention of those circumstances as involving any difference in view between Lord Buckmaster and Lord Dunedin as to the real test of the source of income. There again Lord Buckmaster starts off by negativing as clearly as it could be negatived the proposition that for the source of income one has to look to the place where the work of the employee was done. He says, at p. 291:

> I do not think that the source of income was the employment of the respondent in West Africa.

That, therefore, he puts out of consideration as not being the test. He then proceeds to point out the circumstances in that case which made the source of income an English source of income. It seems to me necessarily to flow from the reasoning of the majority of the House in that case—even assuming, without deciding, that the reasoning of Viscount Cave is inconsistent with it—that, in considering the source of income in the case of an employment, the thing that we are not to look at is the place where the tasks of the employee are performed. It is quite impossible, to my mind, that the opinions to which I have referred could have been couched in the language in which they were couched if any such matter had been considered to be a relevant matter. Indeed, Mr. Hills would have us read the opinion of LORD BUCKMASTER and the opinion of LORD DUNEDIN as meaning that, in considering what is the source of the income, and whether that source is abroad, it is sufficient that some part of the things done under the contract of employment should be done in this country, and in that case one such thing was done —to wit, the payment. If there is one meaning which it is quite impossible to extract from the language used, I should have thought that it was that. It seems to me that that is imputing to the noble and learned Lords concerned a lack of felicity in language and an inability to express their true meaning which I for one am certainly not going to impute to them. The language, it seems to me, is quite clearly establishing the proposition that the place where the work is carried out is not a matter to which attention should be directed. If I am right in my view as to the effect of *Foulsham* v. *Pickles* (2), it has the result in this case that the test as to the source of income is to be looked for in the place where the income really comes to the employee, and that place is Canada. It is out of the United Kingdom—that is where the source is. It follows that this appeal must be dismissed with costs.

ROMER, L.J.: It was decided by the House of Lords in *Colquhoun* v. *Brooks* (1) that the word "possessions" in Case V of Sched. D includes every source of taxable income that is situated abroad.

Now, it was argued before us by Mr. Hills that all that the House of Lords intended to decide in that case—so far, at any rate, as concerns employment—was that the word "possessions" in Case V includes an employment if—but only if—that employment is wholly exercised or carried on abroad. In my opinion, that is not the effect of the House of Lords decision in *Colquhoun* v. *Brooks* (1). It was much wider than that. They have held, in my opinion, and clearly held, that whenever one finds a source of taxable income, of which source it can properly be said that it is wholly situated abroad, that source of income falls to be taxed under Case V of Sched. D, and not under Case I or Case II. It is true, as was pointed out by Mr. Hills, that the whole of the reasoning upon which LORD HERSCHELL and LORD MACNAGHTEN relied for the purpose of saying that trades were included in the word "possessions" in Case V is not applicable to the case of an employment. But LORD HERSCHELL and LORD MACNAGHTEN found, on a very careful examination of the relevant statutory provisions, that the legislature had expressed a clear intention that the word "possessions" in what then corresponded to Case V of Sched. D included what in truth is not a possession at all—namely, a trading activity carried on abroad. Having arrived at the conclusion that a trade was included in the word "possessions," it was quite impossible for them logically to come to the conclusion that the word "possessions" in Case V did not extend to every source of taxable income whatever that source might be, although in reference to those other sources the legislature might not have expressed its intention so clearly as it had expressed it in the case of trades.

I therefore approach this case on the footing that every source of income of which it can be legitimately said that it is situated wholly abroad is taxable under Case V of Sched. D. In those circumstances, one has in cases of trades, professions, vocations and employments to A
ascertain where the source of income is situated. Naturally one cannot decide where the source of income is situated unless one knows what is the source of income. In respect of a trade, take the case of a partner, resident here, in a trade carried on wholly abroad. What is his source of income ? Is it the partnership deed which secures to him a share B
in the profits in the partnership ? Is it the activities of himself and his co-partners exercised abroad ? Or is it the body of commercial contracts entered into with traders, and so forth, that produces the money out of which the profits—and therefore the income—ultimately are derived ? Or can it be said that the customers themselves are the source of income ? C

Now, as regards a trade, I am glad to say that the question has been decisively solved, and solved in the way in which one would have expected it to be solved. It was held by LORD ESHER, M.R., in the case of the *London Bank of Mexico & South America* v. *Apthorpe* (3), that what one had to regard for the purposes of ascertaining the source of income was D
the place where the business was done—that is to say, the place where the trade was carried on—and, if it was carried on solely abroad, then the case would fall within Case V. The same view was expressed by LORD SUMNER in *Mitchell* v. *Egyptian Hotels, Ltd.* (4). LORD SUMNER there pointed out that, in considering whether the business activities E
had been conducted wholly abroad, one had to include amongst the business activities even a passive oversight and tacit control, so that, though the mere business activities were conducted abroad, yet, if one found in this country a passive oversight and tacit control, that would be a sufficient reason for saying that the source of the income was not F
wholly situated abroad.

As regards a profession or vocation, again there can be no doubt. The place of the source of income, the place where the source of income is situated, must be the place where the profession or vocation is exercised and carried on, as was indeed pointed out by VISCOUNT CAVE in the case of G
Foulsham v. *Pickles* (2), where he gave, as an instance of a profession being exercised wholly abroad, a doctor going abroad and exercising his profession there. VISCOUNT CAVE did not refer to the locality of the patients, for instance, from whom the doctor's income was earned, and who, in one sense, of course, might be regarded as the source of the H
doctor's income. The source was constituted by the activities of the doctor in carrying on his profession abroad.

Now, consistently with those decisions, I confess that I should have expected to find that in the case of an employment the locality of the source of income was the place where the employment was actually carried on by the employee—that is to say, where the activities of the employee were to be found—because I should have thought that it would be held, consistently with those other two cases relating to trade, that those activities, the activities of the employee, were the source of the income that he derived from his employment. Of course, in one sense A it may be said that the source of the income that he earns by his activities is his contract of employment. Another possible view, I suppose, would be that the source of his income was his employer, so that, in finding out what was the locality of the source of income, one would have to find out what was the locality—which, I suppose, means the usual place of B residence—of the employer. The House of Lords, as it seems to me, in *Foulsham* v. *Pickles* (2) have definitely decided that in the case of an employment the locality of the source of income is not the place where the activities of the employee are exercised, but either the place where the contract for payment is deemed to have a locality or the C place where the payments for the employment are made, which may mean the same thing.

We were invited both by the Solicitor-General and by Mr. Hills to put a gloss upon the language used by the noble and learned Lords who decided that case. In my opinion, it would not be respectful for us to D put such a gloss on their language as we were invited to do. Unless such a gloss be put upon their language, however, it seems to me that this appeal must necessarily fail. Therefore I agree with SIR WILFRID GREENE, M.R., that this appeal must be dismissed.

E MACKINNON, L.J.: I agree. The respondent's liability to taxation arises under Sched. D (1) (*a*) (ii), which says:

> Tax under this schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing . . . to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere.

F The respondent's liability arises, therefore, from his residence here, but, for the purpose of deciding whether that liability is under Case II or Case V of Sched. D, the fact of his residence here is relevant and material. I think it well to emphasise that, because, in deciding whether Case II or Case V applies, the mind might be perhaps unconsciously influenced G by the fact that the man is a resident in the United Kingdom. The only question, therefore, is whether his liability to taxation is under Case II or under Case V.

If the matter stood free from authoritative exposition, it might well be a matter of grave doubt whether the words "income arising from H possessions out of the United Kingdom" in Case V could apply to income arising from a trade, profession, employment or vocation, but *Colquhoun* v. *Brooks* (1) clearly decides that those words do cover income arising from a trade, and, inferentially, from the other things, and *Foulsham* v. *Pickles* (2) clearly decides that they cover income arising from employment. *Colquhoun* v. *Brooks* (1) further says clearly, as I think, that the test of a locality of a trade or employment is to ascertain the source of the income arising from that trade or employment. The question then is: What is the source of the income of the respondent's employment? Again on the combined authorities of *Colquhoun* v. *Brooks* (1) and *Foulsham* v. *Pickles* (2), I think that clearly it was the United States, in Ohio. I think that that follows from *Foulsham* v. *Pickles* (2), especially from the opinion of VISCOUNT CAVE, L.C., at p. 463, from that of LORD DUNEDIN, at p. 465, and from that of LORD BUCKMASTER, at p. 468. The contract under which the respondent was employed was made in Ohio; his remuneration arising from that contract was paid to him in Canada by remittance from Ohio. There is only one factor in regard to his employment that is relied on for an argument that the source of his income from his employment was in the United Kingdom and not abroad, and that factor is that some of the work that his employment required him to do is, or may be, done in the United Kingdom. Again I remind myself in this connection that the fact that he is residing here is, for this purpose, immaterial. But once again in *Foulsham* v. *Pickles* (2) the whole of the work of Mr. Pickles in his employment was done in West Africa. Nevertheless, it was held that the source of his income was the United Kingdom, and not West Africa, or anywhere else abroad, and, as LORD BUCKMASTER said, at p. 291:

> In the present case I do not think that the source of income was the employment [by which he must mean the work he did] of the respondent in West Africa. The source of his income was the money paid by an English company into an English bank in pursuance of an agreement for service made in this country.

Substituting "the United Kingdom" for "West Africa" and "in Canada" for "into an English bank," that passage is precisely applicable to this case. Therefore, I agree, by virtue of those two authorities, that this appeal fails, and must be dismissed.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Sheard, Breach & Co.* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Re GALLENGA WILL TRUSTS, WOOD *v.* GALLENGA.

[CHANCERY DIVISION (Bennett, J.), **December 16, 1937.**]

Settlements—Powers of tenant for life—By whom exercisable—Discretion given to trustees to pay income to all or any of a class of persons—Settled Land Act, 1925 (c. 18), s. 20 (1) (viii).

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The testatrix by her will gave freehold property unto trustees upon trust during the lifetime of her son, G. H. G., to enter into possession and to receive the rents and profits thereof with the powers of management of trustees in possession during the minority of an infant tenant in tail, and, after payment of certain annuities, in so far as the same were not paid out of the residuary estate, and during the lifetime of her son, or such shorter period or periods, either continuous or discontinuous, as the trustees should think fit, to pay all or any part of the net rents and profits unto, or apply the same for the maintenance or benefit of, all or

discretionary

any one of a number of persons, of whom her son was one. In all these matters the trustees had an absolute discretion. There followed a power to allow all or any of the class of persons already referred to to occupy all or any of the freehold properties, and, subject to such discretionary trusts, the surplus of the rents and profits was to go as if the son were then dead without having exercised the power of appointment hereinafter referred to. There were then remainders in strict settle- A ment, with a further remainder as the son should appoint, and, in default of appointment, to the right heirs of the son. G. H. G. was alive at the time of the summons, having a wife living, but no children, and R. G. was the right heir of G. H. G. :—

HELD: the interests of G. H. G. and R. G. were too unsubstantial for either of them to be the tenant for life of the settlement, and the B powers of the tenant for life were therefore exercisable by the trustees thereof.

[**EDITORIAL NOTE.** It will be noted that the discretionary trust in this case is far wider in its terms than the trusts generally known as protective trusts. It follows from this decision that, where such a wide discretion is to be vested in the trustees and it is not desired that they shall be the persons to exercise the powers C of the tenant for life, then those powers must be expressly conferred upon the person who is intended to exercise them so as to bring into force the Settled Land Act, 1925, s. 23 (1) (*a*).

AS TO PERSONS ENTITLED TO EXERCISE THE POWERS OF A TENANT FOR LIFE, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 626-631, paras. 1100-1104; and FOR CASES, see DIGEST, Vol. 40, pp. 731-740, Nos. 2619-2687.]

D

Case referred to:

(1) *Re Alston-Roberts-West's Settled Estates*, [1928] W.N. 41; 40 Digest 738, *2674*.

ADJOURNED SUMMONS. The plaintiffs were the present trustees of the will of Anna Gallenga for the purposes of the Settled Land Act, 1925, E and for other purposes, and they asked the court to determine whether, on the true construction of the said will, either (and, if so, which of them) the defendant Count Romeo Gallenga or the defendants Guy Hardwin Gallenga and Eva Rosena Gallenga, or any other, and, if so, what, person is tenant for life of the Coed Ithel Estate, for the purposes of the Settled F Land Act, 1925, or whether the plaintiffs, as trustees for the purposes of the said Act and of the settlement affecting the said estate, are statutory owners of the said estate within the meaning of the said Act and have the powers of a tenant for life under the said Act over and in relation to the said estate.

G The material clause of the will is set out in the judgment.

W. T. Elverston for the plaintiffs.

Roger Turnbull for the first and second defendants.

The third defendant was not represented.

H BENNETT, J.: Clause 5 of the will of the testatrix is as follows:

> I devise all my freehold estates and hereditaments whatsoever and wheresoever (other than and except Well Hayes Farm hereinafter mentioned) unto the said Ramsay William Rainsford Hannay and Edward Francis Turner and their heirs to the uses upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same that is to say to the use of the said Ramsay William Rainsford Hannay and Edward Francis Turner their executors administrators and assigns during the lifetime of my son Guy Hardwin Gallenga

> upon trust that my trustees shall enter into the possession or receipt of the rents and profits of the premises comprised in this devise (hereinafter called "my settled freeholds") and shall during the life of my said son continue in such possession or receipt and manage or superintend the management of my settled freeholds with the same powers in that behalf as if my trustees were in such possession or receipt during the minority of an infant tenant in tail and with power to stock and cultivate farms and plant underwood and shall out of the rents and profits of my settled freeholds pay the expenses incurred in such management or otherwise in respect of the settled freeholds and the interest on any principal sum charged on my settled freeholds or any part thereof and also so much and such parts of the said annuities as the income for the time being of my residuary estate shall in the opinion of my trustees not be sufficient to meet and shall during the life of my said son or such shorter period or periods either continuous or discontinuous as my trustees shall in their absolute discretion think fit pay all or any part of the net rents and profits of my settled freeholds unto or apply the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons namely my said son his wife and his children or remoter issue for the time being in existence whether minors or adults and the other persons for the time being interested in remainder whether absolutely contingently presumptively or otherwise howsoever in my settled freeholds in such manner as my trustees shall in their abolute discretion think proper and shall during such period and at such discretion as aforesaid permit all or any of such persons personally to occupy all or any of my settled freeholds and subject to the discretionary trust or power hereinbefore contained shall pay or apply the surplus of the said rents and profits to the person or persons or for the purposes to or upon which the net rents and profits of my settled freeholds would be payable or applicable if my said son were dead without having exercised the power of appointment by will hereinafter conferred on him or shall permit my settled freeholds to be occupied or enjoyed by such person or persons with remainder to the use of the first and every other son of my said son successively in remainder one after the other according to their respective seniorities in tail with remainder to the use of all the daughters of my said son as tenants in common in tail with cross remainders between such daughters as to their original and accruing shares as tenants in common in tail and if there shall be but one such daughter then as to the entirety of my settled freeholds to the use of such one or only daughter in tail with remainder to the use of such persons or person for such estates or estate interests or interest and subject to such powers and provisions as my said son shall by will or codicil appoint and in default of and subject to any such appointment to the use of the right heirs of my said son.

It is upon those dispositions that the question arises. The testatrix's son, Guy Hardwin Gallenga, is alive. He has a wife living, but has no children, and the defendant Count Romeo Gallenga would, if the testatrix's son Guy Hardwin Gallenga were to die, be the right heir, under the old law, of Guy Hardwin Gallenga. Count Romeo Gallenga, unfortunately, has not entered an appearance, and there has been no argument on his behalf for the purpose of establishing that he is a person who has, under the dispositions in the testatrix's will, the powers of a tenant for life over the testatrix's settled freeholds—settled freeholds which, at the present time, produce an income of less than £200 per annum, the whole of which is at the present time being expended by the trustees of the testatrix's will, in exercise of their discretionary trust for the maintenance of the testatrix's son Guy Hardwin Gallenga. It is quite clear, in my judgment, that the interests of Count Romeo Gallenga, under the testatrix's dispositions, and on the facts of the case, are, to use a term applied by Lord Russell of Killowen to the interests of persons similarly situated, under a will in some points similar, "microscopic and unsubstantial." The question is whether Count Romeo Gallenga can be said to be:

> a person entitled to the income of land under a trust or direction for payment

thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale.

If it can be said of him, Count Romeo Gallenga, that he is such a person, then, by virtue of the provisions of the Settled Land Act, 1925, s. 20 (1) A (viii), he is a person who has the powers of a tenant for life under the Settled Land Act, 1925. The question is whether it can be said of him that he is such a person. I think that the matter has been settled, so far as I am concerned, by a decision of CLAUSON, J., in *Re Alston-Roberts-West's Settled Estates* (1). In that case, it was decided by CLAUSON, J., B that a person whose interests were as shadowy, unsubstantial and microscopic as the interests of Count Romeo Gallenga are, in this case, had interests so unsubstantial as to make it impossible to say of him that he was a person entitled to the income of land within the meaning of the Settled Land Act, 1925, s. 20 (1) (viii). CLAUSON, J., is reported to have C said that the scheme both of the old Acts (that is, the old Settled Land Acts) and of the new Act (that is, the Settled Land Act, 1925) was to give the powers of a tenant for life to the persons who possessed the effective possessory ownership of the estate, and not to a person whose interests in the income were so unsubstantial as that of the heir at law, D the heir at law in the case in question being the person who was suggested as the person who had the powers of a tenant for life under the Act. The reasoning of CLAUSON, J., seems to me to be applicable to the facts of the present case, and I propose to follow his decision, and to hold, in answer to the question, that neither Count Romeo Gallenga nor Mr. Guy Hardwin E Gallenga is a person having the powers of a tenant for life, and that the plaintiffs, as trustees for the purposes of the Settled Land Act, are statutory owners of the estate within the meaning of the Act, and have the powers of a tenant for life under the Act.

Solicitors: *E. F. Turner & Sons* (for the plaintiffs); *Ralph Bond, Veitch* F *& Bilney* (for the first and second defendants). No appearance entered for the third defendant.

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

G *Re* NICHOLSON'S SETTLEMENT, MOLONY *v.* NICHOLSON.

[CHANCERY DIVISION (Farwell, J.), **December 2, 3, 1937.**]

Powers—Fraudulent exercise—Power in favour of one object only—Necessity for proof of antecedent agreement with appointee to benefit stranger.

H In 1933, a lady over 80 years of age, and then unmarried, who had a power of appointment of the income derived from settled funds in favour of any husband who should survive her, but no other property of which she could dispose by will, was anxious to benefit some friends who had been kind to her. She got into touch with the solicitors acting for the trustees of the settlement, and through them tried to induce the other beneficiaries under the settlement to come to some family arrangement whereby some part of the capital of the settled funds might be made disposable by her upon her releasing her power of appointment. The beneficiaries being unwilling to come to any such arrangement, she suggested that she might marry and appoint the income of the settlement to a husband, but this did not alter the decision of the beneficiaries not to come to any arrangement. In 1934, she married a gentleman not quite 50 years of age, and, though they saw each other frequently, the lady continued to live with her friends until her death in 1936. Before her death, she exercised the power of appointment in favour of her husband. There was no evidence that the husband was under any legal or moral obligation to use the money otherwise than as he should think fit. It was contended that this was a fraudulent exercise of the power:—

Held: as there was no evidence of any arrangement or bargain between the appointor and the appointee, and as the power was a power to appoint in favour of one object only, and not a power to select from a class of persons, the power was validly exercised, and no fraudulent exercise of the power was established.

[**EDITORIAL NOTE.** A distinction is made in this case between appointments which can be made in favour of one object only and appointments which can be made by way of selection from a class of persons. In the latter case, it may be sufficient to prove an improper motive, but, in the former case, an antecedent agreement with the appointee must be clearly proved if the exercise of the power is to be impeached.

As to Fraudulent Appointments, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-586, paras. 1033-1037; and for Cases, see DIGEST, Vol. 37, pp. 504-515, Nos. 972-1066.]

Case referred to:

(1) *Re Wright, Hegan* v. *Bloor*, [1920] 1 Ch. 108; 37 Digest 453, *555*; 88 L.J.Ch. 452; 121 L.T. 549.

Originating Summons asking for the determination of the question whether, in substance, an exercise of a power of appointment under a settlement was a fraudulent exercise thereof. The facts are fully set out in the judgment.

J. H. Sparrow for the plaintiff, J. R. H. Molony.

Hon. Benjamin Bathurst for Captain Nicholson.

Roger Turnbull and *J. V. Nesbitt* for other parties interested.

Cyril Radcliffe, K.C., and *Geoffrey Cross* for the appointee, Mr. Quatermas.

Bathurst: One has to look at the state of mind of the appointor at the time the appointment was executed, and, if the court is asked to conclude that the appointor has exercised the power with a view to benefiting someone who was not an object of the power, the burden is upon those who allege that the appointment was improper to prove it to be so. [Counsel referred to *Re Wright, Hegan* v. *Bloor* (1).]

Turnbull: The appointor married a man about 40 years younger than herself so that she could appoint the income in his favour, and she expected that that course would result in a benefit to a young married couple with whom she was then residing. She wanted to exercise the power in order to give some benefit to the young couple with whom she was living, and not to the gentleman she was going to marry. The letters do not show how the object of benefiting those persons was to be achieved. The letters show that she had not the slightest wish to give any benefit to the husband. That continued until she received from the solicitors to the family the letter dated Apr. 18, 1934. The court can find that there was in her mind an improper intention—I do not mean by that anything morally reprehensible, but an improper intention—with regard to the exercise of the power of appointment. It is for the appointee to show that it was not exercised under that motive. Directly it is found that there was an intention to exercise the power so that its exercise would inure for the benefit of others not objects of the power, that is an improper motive, which will invalidate the appointment. I rely particularly on the letter of Dec. 30, 1933, which indicates that she was going to marry and appoint to the husband because she thought that by so doing she would render the fund available for her friends, and particularly for the boy who was their son. That was developed by the letter of Feb. 18, 1934, which was also written to the solicitors. There is thrown upon Mr. Radcliffe's client the onus of showing that the appointment was not brought about by an improper motive, and I say that that onus has not been discharged. I ask the court to say that the appointment was not a valid one.

Nesbitt : There is no bargain for the exercise of the power, but it is enough that the purpose of the appointor was to secure a benefit for some person not an object of the power. From the two letters to which Mr. Turnbull has referred, it is reasonably clear that in Feb., 1934, it was the purpose and intention of the appointor to secure a benefit for some person not an object of the power. The question is : Was there that purpose and intention ? The question as to whether the purpose and intention will be carried out does not affect the matter. The question is : What, at the date of the appointment, was the purpose and intention of the appointor ?

Radcliffe, K.C. : My friends have argued the case with a disregard of the facts and of the law which is applicable. It is plain, upon the uncontradicted evidence of the appointee, that the appointor never made any suggestion to him that he was to use the money for the purpose mentioned. The only evidence which suggests the contrary is in the letters written to the solicitors, in which the appointor told them what she wanted to do. The greater part of that correspondence is inadmissible. After she had written the letters to the solicitors, and obtained their views, she was told to go to an attorney, and apparently she went. What she was told does not appear. Only letters written after that date can be used as part of the *res gestæ*, as to what her intention was at the date of the appointment. A strange purpose has been imputed to this lady. She never told her husband a word about desiring to make provision for this other family. It has been urged upon the court that her motive must be looked at. The court has consistently refused to inquire into motive, but it has inquired into purpose and intention, when considering the question of fraud on powers.

FARWELL, J.: The circumstances are a little unusual, but I cannot say myself that I feel any difficulty as to what the answer ought to be. On Mar. 4, 1882, a Mrs. Nicholson in conjunction with her children made a settlement of certain property belonging to her, under which settlement the property was conveyed to trustees to be held by them upon certain trusts for the benefit of the lady herself and her children. Under the settlement, the lady took a life interest, and, subject thereto, the property was divisible among children, the sons taking their shares absolutely and the daughters' shares being settled. The settlement in the case of the three daughters was for the daughters for life without power of anticipation, then in trust for the issue of the daughters as they should appoint, and, in default of appointment, for the children in equal shares, with an ultimate gift over, in the event of there being no children, to the other beneficiaries. The settlement contains this provision:

> Provided always and it is hereby further agreed and declared that it shall be lawful for any of the respective hereinbefore named 3 daughters of the said Elizabeth Ismay Nicholson notwithstanding any coverture or whether covert or sole by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment or by will or codicil to appoint that after her own death all or any part of the dividends interest and income of her said portion or share or of so much thereof as shall not have been or shall not be applied under any of the trusts or powers of maintenance education and advancement hereinafter contained shall be paid to any husband who may survive her for his life or for any less period and upon such conditions and with such restrictions and in such manner as she shall think fit.

All three daughters have now died without issue. Mrs. Nicholson is also dead, and the last surviving daughter was the lady who made the appointment which is now sought to be impeached. She was Miss Edith Elizabeth Nicholson, and she became before her death Mrs. Edith Elizabeth Quatermas. That lady had lived for many years in the United States, and for some years before her death she lived with a family of the name of Souther, who were no relations of hers. She appears to have formed a considerable affection for those persons, the husband and wife and their child, and it is quite plain that in 1933, when the lady was over 80 years of age, she was extremely anxious to make some provision for her friends, and especially for their child. She felt, as she expressed in her letters, that she was under a deep debt of gratitude to them for the care they had taken of her and for the friendship which they had shown. She made it quite plain in her correspondence that she was extremely anxious to do something for them after her death, but she had no property of which she was free to dispose at all. Her means consisted of the income which she derived from this settlement, and she had nothing else which she could give after her death to her friends. That being so, she entered into correspondence with the solicitors who had acted for the trustees and for the family generally with regard to the matter. The correspondence, which began in 1933, contains several letters which make it quite plain what her desire was. I am by no means satisfied that any of these letters of 1933 down to May, 1934, are admissible at all, but I have read them, and I will state quite shortly what I understand the effect of them to be. The lady, having ascertained from the solicitors that there was no capital sum of which she could dispose at all, sought to make a bargain with her relations. She suggested that, if she were to release the power of appointment which she had to appoint the income of her share to her husband, they A should give up half of the capital, so that she might be free to dispose of that in the way she wished—namely, for the benefit of her friends. Her relatives, however, were not prepared to do that, notwithstanding the fact that she held out to them the possibility that, if they would not agree, she would marry and exercise her power of appointment. Not- B withstanding that suggestion, no agreement was made. Finally, the lady was told by the solicitors, who had been in communication with her, and who were, as I have said, the trustees' solicitors, that they could not act for her, and that she should seek advice from her solicitors. It appears quite clear, from a letter of May 20, 1934, that the lady did C consult her solicitors on her own account. However that may be, the lady apparently had made up her mind to get married. What the exact purpose of her marriage was may not be very apparent, unless it was to give effect to the suggestion which she had put forward to her relations, that, if they would not agree with her as to her having some of the D capital, she would marry, and appoint to a husband, which would have the effect, of course, of postponing the enjoyment of her share during the life of her husband. However that may be, the fact is that, in May, 1934, Miss Nicholson married a gentleman called Norris W. Quatermas. The marriage was solemnised in America, and I am assuming that it E was an effective and a valid marriage. It is obviously necessary for the trustees to satisfy themselves that there was a valid marriage, but, assuming that there was a valid marriage, the lady married, and proceeded to exercise the power which she had under the settlement of appointing the income to her husband. The lady, who was then 84 F years of age or thereabouts, and her husband, who was not quite 50, did not live together. They saw each other apparently frequently, but the lady continued to live with her friends. Her husband was living with a sister of his, and they were running an apartment house together. That state of affairs continued until the lady died, in 1936.

G In those circumstances, it is said that the exercise by the lady of the power of appointing the income to the husband is invalid, on the ground that it was a fraud on the power. As I understand the argument, it is said that, because there is evidence that the lady desired to benefit her friends, and sought to make a bargain with her relations for the purpose H of enabling herself to give them a benefit, the appointment must be taken to have been made for the purpose of enabling in some way or other the friends to be benefited, and that, therefore, it was a fraud on the power. I have before me evidence, which is not disputed, that there was never any sort of bargain or arrangement of any kind whatever made between the lady and her husband as to how he would deal with the income, if and when he got it. There is evidence from the husband' and there is evidence from Mr. Souther, who was a friend of the husband, and of the people with whom she was living, that there was no bargain of any kind, or anything to fetter the husband in any way in dealing with the property exactly as he liked. In those circumstances, it appears to me to be absolutely impossible to suggest that there was anything like a fraud on the power in this case. I think that those who seek to impeach this appointment failed to recognise the perfectly clear distinction which has been pointed out in many cases, and which is perfectly well established, between motive and purpose. I will go further, and say that the question of a fraud on the power of appointment, where there is one object and one object only of the power, is a question totally different from the question where the appointor has power to select from a class of persons and in the case of a power to appoint to one person only. In my judgment, it is impossible to establish a fraud on the power unless there is some evidence of some arrangement or bargain between the appointor and the appointee. It need not necessarily be a legal bargain, but there must be some arrangement under which the appointee is to give effect to the purpose of the appointor. In the absence of such evidence, in the case of a power which can be exercised in favour of one person only, in my judgment, it is impossible to prove a fraud in the absence of any such arrangement or bargain. The matter is a totally different one when the appointor has power to select among a class, and selects one or more of a class. In such a case as that, it matters not that the appointee does not know of the improper motive, or that there is no necessity to prove an arrangement. Where there is a sole appointee, then, in the absence of some such arrangement, it is impossible to say that the appointment was not an appointment for the purpose of giving the appointed fund to the one and only person to whom it could be given by the appointor, and, as I say, in the absence of some such evidence, no question of fraud on the power can arise at all. In this case, it is quite plain that the lady had a very strong wish and desire to benefit her friends. She found she could not do so, and, that being so, she elected to marry this gentleman. She elected to exercise the power which she had to appoint in his favour, and, there being no sort of suggestion that the appointee is under any legal or moral obligation of any sort or kind to use the money in any way except in such a way as he thinks fit, in my judgment, the attempt to establish a fraud on the power here breaks down completely. I must accordingly declare, subject to proper proof of marriage, that the exercise of the power is a valid exercise, and must be acted upon accordingly.

Solicitors: *Frere, Cholmeley & Co.* (for the plaintiff); *Frere, Cholmeley & Co.*, agents for *Stilwell & Harby*, Dover; *Douglass, Trasler & Lowe*, Market Harborough; *H. B. Bradley & Hulme*, Folkestone; *T. T. Blyth; Preston, Lane-Claypon & O'Kelly*, agents for *Hazel & Baines*, Oxford (for the parties interested); *Freshfields, Leese & Munns* (for the appointee).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

DRAPER *v.* BRITISH OPTICAL ASSOCIATION.

[CHANCERY DIVISION (Farwell, J.), **December 9, 1937.]**

Injunction—Association—Disciplinary rules—Alleged breach—Member invited to attend meeting—Proceedings commenced by member before meeting held.

The defendant association had adopted a code of ethics which restricted the manner of advertising of its members. The plaintiff was a member, but an advertisement, of which the defendant association complained, was issued by a company carrying on business at various branches, at one of which the plaintiff was manager. The defendant association wrote to the plaintiff calling his attention to the code of ethics and asked for an undertaking that he would not advertise prices or any special method of testing (these being the suggested breaches of the code). They then gave the plaintiff notice that a meeting would be held at which the council of the association would consider the removal of the plaintiff's name from the list of members, and asked whether he wished to attend and be heard. Before the date fixed for the meeting, the plaintiff issued the writ in this action, claiming a declaration that it was *ultra vires* of the defendant association to attempt to enforce on the plaintiff the code of ethics, and for a declaration that the association were not entitled to remove the plaintiff's name from the register :—

HELD : the plaintiff's action was premature, having been commenced before the holding of the meeting of the association at which his conduct would be considered, and it could not be said that the association were threatening or intending to do anything which they were not entitled to do and which would justify the commencement of a *quia timet* action.

[EDITORIAL NOTE. The main contention between the parties was not reached in this case, since it was held that the action was premature. It will be noted that the plaintiff's contention was that, in the circumstances, he being only a manager, acting upon the instructions of a limited company, there could have been no breach of professional discipline by him personally, and that any proceedings against him were *ultra vires*. It was held, however, that, even in these circumstances, his proper course was to await the meeting of the council of the association, and that he had no right to restrain the council from holding that meeting.

AS TO PROCEEDINGS AGAINST AN ASSOCIATION BY ITS MEMBERS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 42-45, paras. 64-66 ; and FOR CASES, see DIGEST, Vol. 28, pp. 458-474, Nos. 739-809.]

ACTION by the plaintiff for an injunction restraining the defendant company, its servants or agents, from enforcing or attempting to enforce on him, the plaintiff, a code of ethics specified in the writ, and for a declaration that the company was not entitled to enforce or attempt to enforce that code on the plaintiff, and that to do so would be *ultra vires* ; secondly, for a declaration that the defendant company was not entitled to remove the plaintiff from the register of members on the grounds set out in letters from the defendant company to the plaintiff dated June 24 and Sept. 6, 1937, or on the ground that the plaintiff advertised prices, or disobeyed the code of ethics, and such removal was *ultra vires*, and he asked for an injunction accordingly.

Fergus D. Morton, K.C., and *E. Holroyd Pearce* for the plaintiff.

R. P. Croom-Johnson, K.C., and *J. Scott Henderson* for the defendants.

Farwell, J.: This action is one by Mr. Harry James Draper, a member of an association known as the British Optical Association, claiming an injunction restraining the defendant company, its servants or agents, from enforcing or attempting to enforce on him, the plaintiff, a code of ethics specified in the writ, and for a declaration (*a*) that the company is not entitled to enforce or attempt to enforce that code on the plaintiff, and that to do so would be *ultra vires*; (*b*) that the defendant company was not entitled to remove the plaintiff from the register of members on the grounds set out in letters from the defendant company to the plaintiff dated June 24 and Sept. 6, 1937, or on the ground that the plaintiff advertised prices, or disobeyed the code of ethics, and such removal is *ultra vires*. This action is in a very unusual form, because, although unfortunately actions between a member and an association as to whether or not a power of expulsion has been properly exercised are not very unusual, and come before the court not infrequently, an action of this kind, brought before the inquiry has been held, is, in my experience, a very unusual form of action, and I do not think that it is a convenient form of action, nor one which ought to be encouraged. However, I have to deal with the action on its merits, and, in order to see what the merits are, I must state quite shortly what are the facts.

The plaintiff has been employed since 1907 by a firm named James Lucking & Co., Ltd., carrying on the business of opticians. Their registered office is in Birmingham, and they have a branch at Worcester. They carry on business as opthalmic opticians, and as persons who sell spectacles and other optical goods, in a shop. They also do what many opticians do—they provide a person or persons capable of testing sight, who test the sight of those who desire to have their sight tested. For that service a fee of 5*s*. is charged, and it may or may not result in their also providing spectacles for the person who has undergone that test. In their shop in Worcester, the plaintiff has been the manager since 1910. The defendant association is a company which was incorporated in 1895. It is a company which is not for profit, and is limited by guarantee. The memorandum and articles of the defendant company are in comparatively short form, and the question which I have to determine may depend to some extent upon the true construction of the memorandum and articles. These I will consider a little later.

The plaintiff has been a member of the defendant association for several years. He has the privilege of attaching certain letters to his name, and certain other privileges, as a result of being a member of the association. Perhaps quite naturally, he is not desirous of having his association with the defendant company terminated by being expelled by the council from that association, and he is apprehensive that that may be done unless this court now interferes. The circumstances which have given rise to his apprehension are these: Some months ago there was published in a paper called The Dioptric News and J.C.Q.O. Journal—which is a paper, I think, under the control of the defendant association—a joint statement of the Worshipful Company of Spectacle Makers and the British Optical Association on the application of the code of ethics, and then there follows this:

> The attention of diploma holders S.M.C. and B.O.A. is drawn to the following code of ethics, governing advertisements and announcements. An optician must not advertise: sight testing, free sight testing or free advice; any special method of testing . . . Infractions of the above code will be regarded as breaches of professional conduct and will be dealt with as such.

That document is signed by the clerk of the Worshipful Company of Spectacle Makers and by Mr. Sutcliffe, the secretary of the defendant association. That statement undoubtedly came to the notice of the plaintiff some months ago, and no doubt the first letter, which I now propose to read, is written with reference to that statement in that paper. On June 24, 1937, the defendant association's secretary, Mr. Sutcliffe, wrote to the plaintiff:

> Dear Sir, I have received an advertisement issued by your firm in which prices of various frames and lenses are quoted. Reference is also made to the use of the "British refractor." In this connection I wish to draw your attention to numbers 2 and 5 of the joint code of ethics recently adopted by the British Optical Association and Worshipful Company of Spectacle Makers, from which you will see that it is not in order for any member to advertise prices or any special method of testing. In view of this I shall be very glad to receive your assurance that such advertisements will be discontinued immediately.

The advertisement referred to in that letter was an advertisement which was sent out, not by the plaintiff himself on his own initiative, but by the employers of the plaintiff. Messrs. Luckings thought it desirable to advertise their spectacles and sight-testing apparatus, and that advertisement contains a picture of some awesome-looking instrument which is referred to as "the British refractor." It contains a picture of specimens of spectacle cases, and it contains prices of lenses, and other matters of that sort. That advertisement was actually sent out, so far as the county of Worcester was concerned, through the branch of which the plaintiff was manager. But, in sending out those advertisement, or in causing them to be sent out, to persons in Worcester or in the neighbourhood of Worcester, he was doing nothing more than obeying the orders of his company, and, so long as he remained in the company, he was, of course, bound to carry out their orders. It was not in any sense an advertisement for his own benefit. It was an advertisement of the company's goods and the company's prices, and it was sent out by the plaintiff under their express instructions.

Having received that letter, the plaintiff wrote back on June 25:

> I am in receipt of your letter of the 24th instant, re our advertisement. It seems to me that this is a matter for our head office and should be glad if you will please communicate with them and oblige.

In answer to that, the defendant association's secretary wrote:

> In reply to your letter of June 25 you will appreciate that the question of advertising concerns the B.O.A. representatives employed by a firm and would suggest that you send my communication to you to your head office with such observations as you may think fit.

The answer to that is on July 10:

> Replying to your letter of July 6 I beg to advise you that I am forwarding this

> letter to my employers' headquarters. You will, of course, realise that my firm are entirely responsible for their business procedure, this being so I am at a loss as to what observations I can make to them. I should be pleased to receive your suggestions.

That letter was written on July 10, and no further letter or correspondence took place between the plaintiff and the defendant association, so far as I know, at any rate on this subject, until Sept. 6, when the defendants' secretary wrote to the plaintiff this letter:

> Dear Sir, I hereby give you 21 days' notice that a meeting of the council of the association will be held on Wednesday, Sept. 29, at 2.30 p.m. at the above address, when the council will consider whether your name should not be removed from the register of members in that you are alleged to have been guilty of conduct which may render you unfit to be allowed to remain a member in consequence of a form of advertisement exhibiting prices. This notice is given to you in accordance with numbers 17 and 19 of the articles of association. I shall be glad to know whether you wish to appear before the council and be heard.

In answer to that the plaintiff wrote saying:

> Your letter of the 7th summoning me to the council meeting on Sept. 29 came as a surprise to me since I have already informed you that I am in no way responsible for the advertisement issued by my firm, who draw up and issue all advertising matter from the head office, 7, Corporation Street, Birmingham, without consulting branch managers. A few days ago I wrote to you asking you to advise me as to my proper course of action, but have received no reply and consequently I have not been able to deal with this matter except by way of conversation with my managing director, who assured me that if the B.O.A. wrote to him he would at once take the matter up with you direct. Under the circumstances I do not see what else I could do and feel that I am being unfairly attacked and possibly penalised for some action for which I am in no way responsible. I trust you will give the matter your careful and fair attention and communicate with the firm direct.

The answer to that was:

> In reply to your letter of Sept. 10, I think you would be well-advised to appear before the next meeting of the council and explain the whole position to them. You may rest assured that the council will give you a fair hearing and every consideration.

On Sept. 21, the secretary wrote again, asking whether it was the intention of the plaintiff to appear before the council.

On that, on Sept. 24, immediately afterwards, the plaintiff consulted his solicitor, and, as I think, somewhat unfortunately, without any further communication with the defendants or any further ascertainment of the position, the plaintiff proceeded, under the advice of his solicitor, to issue the writ in this action at once, and he moved the court for an injunction. When the matter came before the court, the defendants gave an undertaking not to hold the meeting until a reasonable time after the hearing of the action, and on that no order was made. except that this action should be set down for trial without pleadings,

The first declaration which the plaintiff seeks is in relation to this code of ethics. I ought to draw attention at once to the fact that this is not a case in which the plaintiff is suing on behalf of himself and the other members of the association for a declaration that an attempt to enforce this code is *ultra vires* the association. What the plaintiff seeks is a declaration that an attempt to enforce the code on him personally is *ultra vires*. In order to entitle himself to any such declaration or injunction as he seeks with regard to that matter, he has got to satisfy the court that the defendant association has done, or is threatening to do, that which he says is *ultra vires*. If the meeting had been held, if the plaintiff had attended or had not attended, as the case might be, and if the association, as a result of the meeting, had purported to expel him because he had been guilty of an infraction of the code of ethics, then I can well appreciate that he would have a cause of action—though whether he would succeed or not is another matter—which the court would have to try and determine. But that is not the position. The only ground on which it can be suggested, so far as I understand this case, that the defendant association is threatening to enforce on the plaintiff this code of ethics is to be found in this statement in the Dioptric News that "infractions of the above code will be regarded as breaches of professional conduct and dealt with as such," and in the letter of June 24, in which the secretary calls the plaintiff's attention to the code of ethics and asks for an undertaking that he will not advertise prices or any special method of testing. Those two, taken together, are not, in my judgment, any sufficient evidence that the defendant association is threatening or intending to enforce on the plaintiff this code of ethics. It may be that, if and when the defendants hold their meeting, they may think it right to seek to enforce against the plaintiff the provisions of the code of ethics, and, if they do, it may be that they will be acting *ultra vires*. But, until they have sought to enforce that code upon the plaintiff, I myself do not consider that it is for me to determine this question in the abstract. It is quite true that, in a proper case, the court will determine matters of this kind in a *quia timet* action, but there must be before the court, before it will entertain a *quia timet* action, satisfactory evidence that the defendant is threatening or intending to do that which it is said he is not entitled to do, or that which, it is said, will lead to serious damage to the plaintiff.

In my judgment, the plaintiff has wholly failed in this case to show that that is the position. If he had waited, and had seen what had happened at the meeting, and then could have shown and proved that the defendant company had purported to expel him because he had infringed this code of ethics, then there would have been every possible ground for the court considering how far such an action was justifiable within the memorandum and articles, and deciding the question whether or not such expulsion was a proper exercise of the powers. But I am not going to decide here whether this code of ethics is something which the defendant association can impose upon its members, because I am not being asked to determine, as between the association and the members, what are the rights. I am being asked to decide between the plaintiff and the association, and, until I am satisfied that the defendant association are threatening to enforce this code, or that they have actually done so, I am not going to determine whether or not such action is legal.

In my judgment, to that extent, at any rate, this action is wholly premature.

With regard to the second part of this claim, the plaintiff is seeking for a declaration that the defendant company is not entitled to remove the plaintiff from the register on the grounds set out in the letters of June 24 and Sept. 6. To start with, that, in my view, is a complete misunderstanding of the correspondence. The only letter which, in my judgment, can be looked at for the purpose of seeing what the association are proposing to do is the letter of Sept. 6, and upon that letter the plaintiff is given notice of the meeting on a given day:

> The council will consider whether your name should not be removed from the register of members in that you are alleged to have been guilty of conduct which may render you unfit to be allowed to remain a member in consequence of a form of advertisement exhibiting prices. This notice is given to you in accordance with numbers 17 and 19 of the articles of association.

Art. 19 is as follows:

> If any member fails to observe art. 17 or art. 18, or if not less than three other members represent to the council in writing that a member has been guilty of conduct which may render him unfit to be allowed to remain a member, or if it appears to the council that he may have been guilty of such conduct, the council shall consider the allegations made against the member, and if the council is satisfied that the member has committed a breach of either of the said articles, or that he has been guilty of conduct as aforesaid, the council may decide to exclude him from membership.

What the plaintiff says is that there is an allegation against him that, by reason of this form of advertisement, he has been guilty of conduct which renders him unfit to be allowed to remain a member, and the council inform him that on that particular day, the day named, they are going to consider the circumstances, and they are going to give him notice, so that he may attend, and explain exactly what has happened, and how far he is or is not responsible for what has happened, and what likelihood there is of the occurrence being repeated in the future. What the result of that consideration may be I have not the least idea, nor has anyone else, so far as I know, and, again, it seems to me that to attempt now, before it is known what the council elect to do, to seek to restrain the council from holding this meeting is entirely premature, and a misconception of the position. The council are entitled under art. 19 to hold their meeting. They are entitled to consider whether the plaintiff has been guilty of conduct which renders him unfit to remain a member of the association, and they are entitled to consider whether some particular form of advertising constitutes such conduct.

It seems to me impossible for the court to say that the council shall not hold such a meeting. When they hold their meeting, if they elect to expel the plaintiff for some reason which is not a good and sufficient reason, or if, in seeking to expel the member, they are acting *ultra vires* in any way, then no doubt this court will interfere, and will say at once that the resolution purporting to expel the plaintiff is *ultra vires*, and that, in the circumstances, he has not been expelled, but has remained a member. Then the court, no doubt, would restrain the association, if necessary, from purporting to expel him. But to come to the court and to ask the court to restrain the council from holding a meeting before the meeting has been held—which is something in the nature of a *quia timet* action—when nobody knows what is going to happen at the meeting, seems to me again to be a misconception of the whole position. Whether or not the plaintiff will have proper grounds for complaint when the meeting has been held I know not, and, so far as I know, no one knows. If, at the meeting, when it is held, the association decide that the plaintiff has not been guilty of conduct which renders him unfit to be a member, then he will not be damnified, and this action will have been wholly unnecessary. If, on the other hand, they do decide that he has been guilty of conduct which does render him unfit, then that will be the time for the plaintiff to consider whether, in taking that course, they have acted unconstitutionally, or outside their powers. If he takes the view that they have done so, he will then be in a position to come to the court, and, if he comes again to the court after the meeting, I sincerely hope that it will be in an action in which there are pleadings. He will then be able to plead in his statement of claim exactly what it is that he alleges was unconstitutional and *ultra vires* the association, and to seek relief on that ground. In my judgment, however, this action, at the present time and in the present circumstances, is misconceived, and must be dismissed with costs.

I have endeavoured to be very careful not to express any view at all on the various arguments addressed to me as to the meaning of the articles of association, and other matters of that sort, because, if this were an action by someone suing on behalf of all other members, asking the court to determine that a particular thing was *ultra vires*, it might be a proper matter for the court to consider. But, as this is only an action for a declaration that something an association is seeking to enforce against the plaintiff is *ultra vires*, and as I am not satisfied that there is any evidence of that at all, I have been careful not to say anything as to the powers or otherwise of the association. If, when the meeting has been held, the plaintiff thinks he has a cause of complaint, and he is expelled, he may then think it worth while to try again. This action is, in my judgment, one which must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Reed & Reed* (for the plaintiff); *Wedlake, Letts & Birds* (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Applied. H.M.S. Truculent. [1951]
2 All E.R. 968.

CORSTAR (OWNERS) *v.* EURYMEDON (OWNERS), THE EURYMEDON.

[Court of Appeal (Greer, Slesser and Scott, L.JJ., with two assessors), **November 26, 29, 30, December 1, 20, 1937.]**

Negligence—Contributory negligence—Last opportunity of avoiding accident.

Shipping—Collision—Apportionment of blame—Vessel improperly moored athwart fairway—Insufficient look-out.

A collision occurred in the Long Reach of the Thames between the Eurymedon and the Corstar. It was found as a fact that both vessels were to blame, the Corstar in that she was improperly anchored athwart the fairway, and the Eurymedon in that she had kept an insufficient look-out, and could have avoided the collision had she been properly managed :—

Held : there had been a continuing negligence on the part of both vessels, which had lasted right up to the time of the collision. In these circumstances, it could not be said that either vessel had had the last opportunity of avoiding the collision, and both vessels were equally to blame.

If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame.

[EDITORIAL NOTE. The judgments herein consider very carefully the effect of the cases upon contributory negligence, so that, although the facts are concerned with a collision in the River Thames, much that is said in those judgments will be applicable where contributory negligence is relied upon in ordinary cases of personal injuries. It will be noticed that Greer, L.J., enunciates five rules as to contributory negligence, but it is suggested in the judgment of Scott, L.J., that these rules are not exhaustive of the subject, although he agrees with them as far as they go.

As to Contributory Negligence, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679-689, paras. 963-973 ; and for Cases, see DIGEST, Vol. 36, pp. 109-121, Nos. 726-809.]

Cases referred to :

(1) *Cayzer* v. *Carron Co.* (1884), 9 App. Cas. 873 ; 41 Digest 783, *6441* ; 54 L.J.P. 18 ; 52 L.T. 361 ; *revsg.* S.C. *sub nom. The Margaret*, 9 P.D. 47.
(2) *The Margaret* (1881), 6 P.D. 76 ; 41 Digest 697, *5287* ; 50 L.J.P. 67 ; 44 L.T. 291.
(3) *The Monte Rosa,* [1893] P. 23 ; 41 Digest 782, *6430* ; 62 L.J.P. 20 ; 68 L.T. 299.
(4) *Admiralty Comrs.* v. *S.S. Volute,* [1922] 1 A.C. 129 ; 41 Digest 780, *6417* ; 91 L.J.P. 38 ; 126 L.T. 425.
(5) *Davies* v. *Mann* (1842), 10 M. & W. 546 ; 36 Digest 113, *751* ; 12 L.J. Ex. 10.
(6) *Dowell* v. *General Steam Navigation Co.* (1855), 5 E. & B. 195 ; 41 Digest 780, *6414* ; 26 L.J.Q.B. 59 ; 25 L.T.O.S. 158.
(7) *British Columbia Electric Ry. Co., Ltd.* v. *Loach,* [1916] 1 A.C. 719 ; 36 Digest 117, *781* ; 85 L.J.P.C. 23 ; 113 L.T. 946.
(8) *Swadling* v. *Cooper,* [1931] A.C. 1 ; Digest Supp. ; 100 L.J.K.B. 97 ; 143 L.T. 732.
(9) *Butterfield* v. *Forrester* (1809), 11 East, 60 ; 36 Digest 112, *745.*
(10) *Tuff* v. *Warman* (1858), 5 C.B.N.S. 573 ; 41 Digest 780, *6415* ; 27 L.J.C.P. 322.
(11) *McLean* v. *Bell* (1932), 147 L.T. 262 ; Digest Supp.
(12) *The Bywell Castle* (1879), 4 P.D. 219 ; 41 Digest 771, *6267* ; 41 L.T. 747.

(13) *Baker* v. *Longhurst (E.) & Sons, Ltd.*, [1933] 2 K. B. 461; Digest Supp.; 102 L.J.K.B. 573; 149 L.T. 264.

(14) *Tidy* v. *Battman*, [1934] 1 K.B. 319; Digest Supp.; 103 L.J.K.B. 158; 150 L.T. 90.

(15) *H.M.S. Sans Pareil*, [1900] P. 267; 41 Digest 746, *5977*; 69 L.J.P. 127; 82 L.T. 606.

A (16) *The Samurai* (1920), 5 Ll. L.R. 333.

(17) *Colchester Corpn.* v. *Brooke* (1846), 7 Q.B. 339; 36 Digest 203, *444*; 15 L.J.Q.B. 59; 5 L.T.O.S. 192.

(18) *The Batavier* (1845), 2 Wm. Rob. 407; 41 Digest 776, *6354*; 6 L.T.O.S. 258.

(19) *Dalton* v. *Denton* (1857), 1 C.B.N.S. 672; 41 Digest 817, *6775*; 6 L.T. 228.

(20) *Frances (Owners)* v. *Highland Loch (Owners), The Highland Loch*, [1912] B A.C. 312; 41 Digest 687, *5168*; 81 L.J.P. 30; 106 L.T. 81; *affg.*, [1911] P. 261.

(21) *The Cachapool* (1881), 7 P.D. 217; 41 Digest 686, *5167*; 46 L.T. 171.

(22) *Mersey Docks Trustees* v. *Gibbs, Mersey Docks Trustees* v. *Penhallow* (1866), L.R. 1 H.L. 93; 41 Digest 977, *8665*; 35 L.J. Ex. 225; 14 L.T. 677; *affg.* S.C. *sub nom. Gibbs* v. *Liverpool Docks Trustees* (1858), 3 H. & N. 164.

C (23) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 41 Digest 982, *8700*; 52 L.J.Q.B. 702; 49 L.T. 357.

(24) *Radley* v. *London & North Western Ry. Co.* (1876), 1 App. Cas. 754; 36 Digest 109, *729*; 46 L.J.Q.B. 573; 35 L.T. 637.

Appeal and Cross-Appeal from an order of Bucknill, J., dated D June 11, 1937.

K. S. Carpmael, K.C., and *Owen L. Bateson* for the appellants.

H. G. Willmer and *Vere Hunt* for the respondents.

Carpmael, K.C.: Actual knowledge of an obstruction is not necessary: *Butterfield* v. *Forrester* (9), *Admiralty Comrs.* v. *S.S. Volute* (4), E *Baker* v. *Longhurst (E.) & Sons, Ltd.* (13). If the Eurymedon ought to have known of the position of the Corstar, she is in the same legal position as that in which she would be if she did know it: *Davies* v. *Mann* (5). In any case, she was the author of her own wrong. The only negligence alleged against the Corstar is that her lights were dim F and that she was anchored in an improper place. The judge found that the lights were good. There is no rule of law and no bye-law to the effect that a ship may not anchor in a fairway. Here there is nowhere else where vessels can anchor, as the whole river is fairway. [Counsel referred to *Tidy* v. *Battman* (14), *Swadling* v. *Cooper* (8), *McLean* v. *Bell* (11), G *British Columbia Electric Ry. Co., Ltd.* v. *Loach* (7), *Cayzer* v. *Carron Co.* (1), *Tuff* v. *Warman* (10), *H.M.S. Sans Pareil* (15), *The Samurai* (16), *Colchester Corpn.* v. *Brooke* (17), *The Batavier* (18), *Dalton* v. *Denton* (19), *The Highland Loch* (20), *The Margaret* (2), *The Monte Rosa* (3), *The Cachapool* (21), *Mersey Docks Trustees* v. *Gibbs* (22), and *Heaven* v. H *Pender* (23)].

Willmer: The cross-appeal ought to succeed, because the Eurymedon was not guilty of any negligence. It is necessary to take into account the surroundings. There were numerous lights all round. The Corstar was moored athwart the stream, and the Eurymedon was approaching her amidships. There was, therefore, nothing to show that her two lights belonged to the same ship, until it was possible to see her hull. She had no deck-lights or port-lights. If the ignorance was due to the negligence of both parties, then the judge was right. It is a question of causation. Whose fault was it that the Eurymedon was ignorant of the Corstar's position? [Counsel referred to *Admiralty Comrs.* v. *S.S. Volute* (4) and *Swadling* v. *Cooper* (8).] The judge must ask himself: Who was it that substantially caused the collision? In this case, the question should be: Who was it that caused the ignorance? It is a question of degree as to when a careful navigator ought to have become aware of the fact that the lights ahead in fact belonged to a vessel moored athwart the stream. The negligence of the Corstar was a continuing negligence. She had the last opportunity of avoiding the accident. She failed to keep a good anchor-watch, and her negligence was a contributory cause of the collision. [Counsel referred to *Radley* v. *North Western Ry. Co.* (24).]

Carpmael, K.C., in reply.

Greer, L.J. [read by Slesser, L.J.]: Shortly after 6 a.m., the plaintiffs' steamship Corstar and the defendants' steamship Eurymedon came into collision in the Long Reach of the River Thames, which is shown on the charts put in evidence. Bucknill, J., held both vessels to blame, and apportioned the damages equally. The owners of the Corstar appeal, on the ground that the negligence of those on board the Corstar was not a contributing cause of the collision, because those in charge of the Eurymedon saw, or ought to have seen, her riding-lights in time to take action to avoid colliding with her. The owners of the Eurymedon cross-appeal, on the ground that the sole cause of the collision was the negligence of the Corstar.

The material facts proved, and the findings of the judge, are summarised in a very clear judgment, and I find it unnecessary to repeat them in my judgment. I read the judgment as meaning that those in charge of the Eurymedon saw the riding-lights of the Corstar earlier than they said in their evidence, but that they did not identify them as the lights of a vessel at anchor, because they were not expecting to see a vessel anchored in the position in which the Corstar had been put and allowed to remain. I think that the judge found the Eurymedon partly to blame, on the ground that, seeing the lights, and not knowing what they indicated, those in charge of the Eurymedon should have reduced her speed. The judge in his judgment says:

> The first question which I now have to consider is whether the Eurymedon was negligently navigated. The conclusion to which I have come is that the failure on the part of those in charge of the Eurymedon to identify the anchor-lights of the Corstar as such in time to avoid a collision with her was partly due to the Corstar's unusual and improper, and therefore unexpected, position in the river, and also was partly due to the fact that those on board of the Eurymedon as they approached the place of collision were not sufficiently alert to the possibility of danger ahead and did not take proper action to reduce their speed in due time. I doubt whether I have heard from the Eurymedon a complete account of the observations made on board her with reference to the Corstar's lights. The conclusion I have come

to after hearing all the evidence is that those in charge of the Eurymedon became aware or should have become aware of white lights ahead which proved to be those of the Corstar at a distance greatly in excess of 650 ft., and in ample time to avoid a collision with her, and that they did not take any action until the hull of the Corstar was sighted at about 650 ft. because they did not realise until they saw the hull that the lights were the riding-lights of a vessel at anchor athwart the fairway. On seeing these lights, I am advised that those in charge of the Eurymedon should have realised the possibility of a ship or ships ahead, the precise position of which A was obscure, and should have made a reduction of speed immediately.

I entirely agree with this decision as to the fault of the Eurymedon. The judge's decision with regard to the negligence of the Corstar is stated as follows:

B In my view, and in this also I am supported by the advice of the Elder Brethren, those in charge of the Corstar were lacking in good seamanship in allowing the Corstar to lie athwart in the river in this place and at this time in the position as found by me. The fact that the master and the chief officer of the Corstar have denied that their ship ever got into this position indicates what their own opinion on this point is. If they had taken any care to ascertain their position at anchor, which I think they did not do, they would have known that the vessel under the prevailing conditions of wind and tide would be lying athwart the fairway on the C last of the flood, and at a time when vessels would be coming up and down river, and that they would be an obstruction to them as well as being in a very unusual position. There was no necessity whatever for the Corstar to be there, and after those in charge of her became alive to her position they moved away to a proper anchorage on the south side of the river. The Corstar had a very indifferent anchor-watch, a man who apparently did not realise that the vessel was athwart the river. In my view the conduct of those in charge of the Corstar in lying in this D position was negligent. They were behaving in such a way as to make a collision probable with vessels proceeding up or down the river, and their conduct was not caused by any necessity but merely by lack of good seamanship, and failure to take ordinary precautions to avoid risk of collision.

That those in charge of the Corstar were guilty of great negligence in anchoring their ship so as to allow it to get into the position athwart E the fairway cannot be disputed, but the judge had to deal with the contention put forward on behalf of the Corstar, that the negligence referred to was not a contributing cause of the collision, because those in charge of the Eurymedon could, by the exercise of reasonable care, have avoided colliding with the Corstar. The judge deals with the question in the F words following:

The third issue that arises is whether, assuming the position of the Corstar was improper and those in charge of her were guilty of negligence in allowing her to get in that position, such negligence contributed to the collision, or whether the principle laid down in *Cayzer* v. *Carron Co.* (1) applies. In my view that issue depends to some extent upon the question whether the negligence of the Corstar in taking up that position contributed to the failure of those in charge of the G Eurymedon to take appropriate action to avoid a collision until they were too close to clear her and the Corchester. If these incidents had occurred by day and those in charge of the Eurymedon had known that the Corstar was at anchor athwart the fairway in ample time to avoid her without difficulty, the fact that it was an improper place for her to lie would clearly not have made the Corstar's negligence one of the contributory causes of the collision. The knowledge or lack of knowledge of the Eurymedon as to the improper position of the Corstar appears H to me to be a cardinal fact on this issue as to the liability of the Corstar. The crucial factor of such knowledge appears to explain the difference between the decisions in *The Margaret* (2) and in *The Monte Rosa* (3), as Lord Birkenhead pointed out at p. 137 of his opinion in *Admiralty Comrs.* v. *S.S. Volute* (4). In this case those in charge of the Eurymedon did not appreciate the fact that the Corstar was at anchor until it was too late to avoid her. I have already decided that the Eurymedon was to blame for not taking earlier action by reducing speed, but the negligence of the Corstar in allowing herself to get into an improper position does seem to me to be wrapt up with and part of the negligence of the Eurymedon.

To quote the words of LORD BIRKENHEAD in *Admiralty Comrs.* v. *S.S. Volute* (4), i.e., in the ordinary, plain common sense of the business the Corstar has contributed to the accident by her negligence. I therefore find both vessels to blame.

I understand the judge's decision to be that the failure of those in charge of the Eurymedon to identify the Corstar as a vessel at anchor in the fairway was in part caused by the negligence of those in charge A
of the Corstar in so anchoring her that she got into, and was allowed to remain in, a position in which no vessel navigating the Long Reach would expect her to be, and caused those on the Eurymedon to fail to identify the meaning of her lights. Having regard to the express findings of the judge, I do not feel it necessary to consider in any detail the B
numerous cases cited to us by Mr. Carpmael for the appellants. I think that the judge's finding that both vessels were to blame was in accordance with the evidence, and that his judgment ought not to be disturbed.

I think that the law arising out of what is usually called the *Davies* v. *Mann* principle (5) may be stated as follows: (i) If, as I think was the C
case in *Davies* v. *Mann* (5), one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff. (ii) Rule (i) applies also where one party is not in fact aware of the other party's negligence if he could by reasonable D
care have become aware of it, and could, by exercising reasonable care, have avoided causing damage to the other negligent party. (iii) The above rules apply in admiralty with regard to collisions between two ships as they apply where the question arises in a common law action. (iv) If, however, the negligence of both parties to the litigation continues E
right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both. (v) If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame.

In my judgment, the present case comes within rr. (iv), (v), above F
stated. Rules (i)-(iv) have been established beyond question by the long line of cases cited by Mr. Carpmael for the appellants.

There has been no case before the present expressly based on r. (v). But I think that r. (v) is a necessary corollary to r. (iv), and it is implicitly G
involved in the decision of the court in *Dowell* v. *General Steam Navigation Co.* (6), which was approved in *Admiralty Comrs.* v. *S.S. Volute* (4), at p. 139, in the decision of the Privy Council in *British Columbia Electric Ry. Co., Ltd.* v. *Loach* (7), and in the decision of the House of Lords in *Swadling* v. *Cooper* (8).

For these reason, I think that the decision of BUCKNILL, J., was H
right, and that this appeal should be dismissed with costs.

SLESSER, L.J.: In this case, which has arisen out of a collision between two vessels in the Long Reach of the Thames shortly after 6 a.m. on Jan. 6, 1937, it is not disputed that the Corstar at the time of the casualty was at anchor, and the judge has found that these in charge of her were lacking in good seamanship in allowing her to lie athwart the river in a very unusual position, improper and dangerous from the point of view of traffic up and down. The judge accepted the evidence of the pilots of several vessels, who had succeeded, some with A great difficulty, in passing the Corstar, that, instead of complying with the practice in Long Reach of anchoring to the southward of mid-channel, so that large vessels proceeding up and down river could pass to the northward, the Corstar was lying with her whole length to the north of mid-river, and athwart the fairway in such a position that she was B obstructing a large part of the fairway used by traffic up and down the river. Subject to this condemnation, the judge has found that the Corstar was exhibiting anchor-lights which complied with the bye-laws, and that she was not to blame in that respect, but that she was negligent in that there was no necessity whatever for her to be in that dangerous C place, and that she had a very indifferent anchor-watch—a man who apparently did not realise that the vessel was athwart the river or did not take steps to prevent it. This was the negligence found on the part of the plaintiffs. As to the defendants, the Eurymedon, the judge said, was also negligently navigated, in that there was a failure on the part D of those in charge of the Eurymedon to identify the anchor-lights of the Corstar as such, in time to avoid the collision. The reason why they did not identify the lights until they were comparatively close to the Corstar, he finds, was because they were not expecting to see a vessel anchored in this position, and were not there looking out for, nor E expecting to see, the anchor-lights of a ship lying across the fairway. Finally, on this head, he thinks that those in charge of the Eurymedon became aware, or should have become aware, of the lights ahead, which proved to be those of the Corstar, at a distance in ample time to avoid the collision with her, and that they did not take any action until the F hull of the Corstar was sighted at 650 ft., because they did not realise, until they saw the hull, that the lights were the riding-lights of a vessel at anchor athwart the fairway.

The judge, on these findings, came to the conclusion that both vessels were to blame, and that the negligence of the Corstar in taking up her G position contributed to the failure of those in charge of the Eurymedon to take proper action, and that this negligence of the Corstar was so wrapt up with and part of the negligence of the Eurymedon as to compel him to say that, in the ordinary common sense of the business, the Corstar contributed to the accident by her own negligence.

H In these circumstances, the causal argument, not unfamiliar, but always difficult to determine, is raised by Mr. Carpmael for the appellants, the plaintiffs. He says, endeavouring to bring the case within the doctrine of last opportunity, that, on the finding of the judge, such last opportunity was with the Eurymedon, who, had she kept a proper look-out, would have seen, or ought to have seen, the lights of the ship at anchor, and, had she seen them, ought to have appreciated from their presence that there was a ship athwart the fairway, in which case she could have avoided the vessel by passing her to the north of the Reach, in that part of the river which was still unobstructed. He invokes the well-known authority of *Davies* v. *Mann* (5), to the effect that, where an accident arises through the combined negligence of two persons, the liability is on him who had last opportunity of avoiding the accident.

In *Davies* v. *Mann* (5), it is not clear, as I read the case, whether the driver of the defendant's wagon which ran against the plaintiff's fettered ass did or did not see the donkey. I think from the judgment of PARKE, B., at p. 549, that it was found that he probably did so see the ass, though too late. On the other hand, in *Butterfield* v. *Forrester* (9), the plaintiff, who was riding at a time when there was light enough to discern an obstruction 100 yds. distant, rode violently, and did not observe it, the evidence being that, if he had not ridden very hard, he might have avoided the obstruction. In the language of BAYLEY, J., at p. 61 :

> If he had used ordinary care he must have seen the obstruction. . . .

As against this view, the judge, as I have said, in this case has found in effect that there was here such a continuing negligence on the part of the plaintiffs as to make it proper to say in the language of VISCOUNT BIRKENHEAD, L.C., in *Admiralty Comrs.* v. *S.S. Volute* (4), at p. 145, that there does not seem to be a sufficient separation of circumstance between the negligent navigation of the one ship and that of the other to make it right to treat the negligence of the one as the sole cause of the collision.

In the present case, the judge has come to the conclusion that, if the Eurymedon had known by day that the Corstar was at anchor athwart the fairway in ample time to avoid her without difficulty, the fact that it was an improper place for her to lie would clearly not have made the Corstar's negligence one of the contributory causes of the collision. But he thinks that the Corstar in this accident at night has contributed to the collision by being in a place so unexpected that the Eurymedon was not looking out for nor expecting to see her anchor-lights. I appreciate the difficulty which was urged upon us by Mr. Carpmael in accepting this view. Both in *Davies* v. *Mann* (5) and in *Butterfield* v. *Forrester* (9), obstructions were left in a position where they were not reasonably to be expected. Indeed, anything less likely than that a fettered ass would be found upon a highway it is difficult to imagine, and, were the matter to end here, I should have the greatest difficulty in coming to the same conclusion as that of the judge. The case of *Tuff* v. *Warman* (10) supports the view that, if the absence of a look-out was negligence on the part of the plaintiffs, still, if the defendants also had a look-out and nevertheless persisted in a course that would inflict an injury, they would be liable, though the plaintiffs had no look-out, for that neglect of the plaintiffs would not be the direct cause of the injury—that is to say, would not be a cause without which the injury would not have happened (per WIGHTMAN, J., at p. 586). In the present case, however, there is another ground for asserting a continuing negligence on the part of the plaintiffs. In my view, the plaintiffs, by failing to prevent the vessel from getting athwart the river under A the prevailing conditions of wind and tide on the last of the flood, in that they had not any competent anchor-watch, and failed to use their engines from the time when the vessel started to go athwart, as they might have done, have by their own negligence denied themselves the opportunity of avoiding the accident, and this opportunity which they B had prevented themselves from using (though their engines were kept handy for the tide turning, and main steam had been maintained, and the engineer was in charge of the engines) would, had they not been negligent, have continued throughout the night up to the time of collision. This would appear to be the effect of *Loach's* case (7), where the railway C company would have had the last opportunity of avoiding the accident, but for their sending out a car with a defective brake. The Judicial Committee there held the company liable, although the last actual negligence was in the plaintiff, on the ground that the opportunity which the railway company ought to have had, but for their negligence, must D be deemed to be a continuing opportunity. Despite some doubts formerly expressed as to this case, it now appears from the speech of LORD WRIGHT in *McLean* v. *Bell* (11), at p. 264, that *Loach's* case (7) is to be regarded as good law, binding upon this court, a view with which the other noble and learned Lords associated themselves.

E In the result, I have come to the same conclusion, though in part for different reasons, as that of the judge, that, in all the circumstances of the case, both parties to the action are to be held to blame.

SCOTT, L.J.: In my opinion, this appeal should be dismissed. F I agree with the conclusion reached by BUCKNILL, J., that both vessels were to blame, and I do not think that we should alter his apportionment. I see no ground for thinking that in holding both vessels to blame he acted on any wrong view of the law, and I am satisfied that the evidence amply warranted his findings of fact. As has been pointed G out in both the judgments already delivered, the appeal of the Corstar was based on the contention that the facts disclosed a *Davies* v. *Mann* case (5), entitling the Corstar to a judgment that the Eurymedon was alone to blame. I will state my views upon the facts before I discuss the question of law. Upon most of the facts there was no dispute, H but there was one question which was in direct controversy, and another which raised some degree of doubt. The controversy turned on an attack by witnesses from the Eurymedon upon the Corstar's anchor-lights as being insufficiently bright to satisfy r. 14 of the Thames Bye-laws. The judge, however, went into the evidence with great care, believed the Corstar's lamp-man, who gave evidence before him, and finally disposed of the attack by holding that the Corstar was duly exhibiting anchor-lights which complied with the bye-law. That finding was not contested before us. The question upon which there was doubt was as to the time when the Eurymedon in fact saw the anchor-lights of the Corstar and realised what they were, and whether at that time it was still possible for her, by helm and engine action, to avoid a collision. The language of the judgment is not quite definite on this point, but, as I read it, I think that the judge intended to find that those on the Eurymedon saw both the lights of the Corstar when the Eurymedon was still a considerable distance away (although he did not say how far), but he says that they did not then "identify" them. By his finding I think he meant that those responsible for the navigation of the Eurymedon actually saw the two lights of the Corstar, but did not realise that they were the anchor-lights of a ship of the sort or size of the Corstar, lying athwart the fairway. He does not go so far as to find the Eurymedon guilty of a bad look-out. Indeed he rather goes out of his way to minimise the blame which would normally attach to the failure to identify the lights by suggesting that it may have been due partly to the abnormal position of the Corstar in the river—i.e., lying right athwart the northern half of the fairway, and blocking the usual route for traffic—a position where no up-coming steamer would expect an anchored vessel to be, and partly to the glare of the shore-lights extending in alternating patches of light and dark along the north shore up to and past Cory's Jetty. Had the judge definitely found that, when the Eurymedon was first within the range of full visibility of the Corstar's lights, i.e., a mile away, she then fully realised what the Corstar's lights were and meant, he could hardly have helped holding her alone to blame, on the reasoning of *Davies* v. *Mann* (5) and *Cayzer* v. *Carron Co.* (1) (the second *Margaret* case). On similar reasoning, if he had found her definitely guilty of bad look-out throughout, with no extenuating circumstances, and had also found that, with a proper look-out, she would have had ample time and opportunity to keep out of the Corstar's way, then again it may be that he ought to have held her alone to blame: see *Butterfield* v. *Forrester* (9), to which SLESSER, L.J., has referred. However, he makes no such finding, nor was there, in my opinion, evidence upon which we can say that he ought to have so found. The question, therefore, of what legal conclusion ought to follow upon such a finding of fact does not arise. On the evidence and on the judge's actual findings of fact, I cannot see how he could attribute all the blame to the Eurymedon, nor avoid holding that the Corstar was in part responsible for the collision. As I read his judgment, his conclusion was one of pure fact. From the first moment that the Eurymedon began to approach the Corstar with a view to passing up the reach along its northern half, which the evidence showed to be the usual track of vessels in the fairway, the Corstar's disregard of the obligation of good seamanship (which was a merely abstract obligation as long as no ship wanted to pass) became a breach of positive duty towards the Eurymedon. The Corstar was lying in a position which was, to the pilot of the Eurymedon, so unprecedented as to be wholly unexpected. He had been a Thames pilot for 30 years, and it struck four wholly independent pilots, with similar experience, in just the same way. The common-sense A view of the effect of this negligence seems to me to be that it was, throughout the period when the Eurymedon was approaching her, down to the moment of impact, a continuing source of embarrassment to the Eurymedon, and, therefore, of necessity a contributing factor, for which the Corstar cannot escape responsibility.

B That the Eurymedon was also to blame, as held by the judge, seems to me to be obvious. Even assuming, as I do assume, that he was justified in not finding her guilty of bad look-out when she first came within the minimum range of the Corstar's lights under the bye-law—one mile—there must have been a point, much further from the Corstar C than the 650 ft. at which they began to see the loom of her hull, when those on the Eurymedon ought to have seen and identified her anchor-lights; and from that time she came under a definite duty to take helm and engine action, in order to avoid or minimise the effect of a collision with a ship at anchor. For this the Eurymedon was clearly to blame. D This negligence of the Eurymedon was from that time a continuing negligence, just as the failure of the Corstar to rectify her position in the river was a continuing negligence, and both continued until the collision. It follows that each ship was guilty of negligence towards the other, that each ship thereby contributed to the collision, and that each ship E must consequently be held to share the legal responsibility for the result.

I now deal with the legal arguments addressed to us. GREER, L.J., has stated in the form of five rules the gist of the law applicable for the solution of cases like the present. His propositions do not, as I understand them, purport to be a codification of the branch of law embodied F in *Davies* v. *Mann* (5) and the innumerable cases which have either followed or distinguished it, but only to state shortly those aspects of that branch of law which are germane to the present controversy. With the first four I agree, but the fifth rule can, in my view, be regarded as only a statement of the legal result of the facts of the present case. As G a general rule, it would, I think, need some elaboration and qualification.

During the hearing of the appeal, Mr. Carpmael, for the Corstar, cited to us most of the cases in which the principle of *Davies* v. *Mann* (5) has been discussed, but, in my view, the broad feature which results from the cases is, alike in admiralty and at common law, that the final H question is one of fact, to be decided by the tribunal of fact, with due regard to all the circumstances of the case, as BUCKNILL, J., pointed out at the end of his judgment. I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense.

I respectfully agree with a phrase of LORD WRIGHT in *McLean* v. *Bell* (11), at p. 264:

> the decision, however, of the case must turn not simply on causation but on responsibility.

When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the A
last act or omission in point of time is of necessity not only the last link in the chain of causation, but also the determining factor in the result, since, *ex hypothesi*, but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link. This is especially so in maritime collisions, just because B
in the behaviour of large vessels the effect of a given cause may, for physical reasons, continue in operation for a long time, or may not show itself at all till after a considerable interval of time. And, if the cause was set in operation by negligence, it will not lose that characteristic merely through the lapse of time. Until some other person comes "into C
range", as it were—I include the personified ship of Admiralty parlance—the duty of proper navigation is doubtless abstract, for a breach of it affects no one. But, as was said by ANGLIN, J., in the judgment quoted with approval by LORD SUMNER in *British Columbia Electric Ry. Co.* v. *Loach* (7), at pp. 726-727, on the emergency happening, the abstract D
obligation becomes a concrete duty towards the person affected by it. In that case, the action was by the administrator of the estate of a man who had been killed by a train at a level-crossing. The deceased was found by the jury to have contributed to the accident by his own negligence—namely, in crossing without looking out. But they also found E
that the reason the brakesman failed to stop the train was because by anterior negligence of the company's servants the brake was in a defective condition. In his judgment, ANGLIN, J., said, as quoted at pp. 726, 727:

> But there is a class of cases where a situation of imminent peril has been created, F
> either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe. . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part G
> of the inducing causes—a remote cause or a cause merely *sine qua non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. . . . H

The Privy Council approved that passage, saying that "on the facts of the present case the above observations applied and were correct," and the House of Lords have subsequently recognised that Privy Council decision as consonant with English law. In *Loach's* case (7), the Privy Council held that it was the company's negligence which was the effective cause of the accident. A comparable and not infrequent illustration of the continuing character of maritime negligence is defective steering-gear, for which many ships have been held to blame in the Admiralty Court. In such cases, the negligence often happens before the voyage begins.

A The idea that the last act of negligence is necessarily, or even presumably, to be regarded as "the efficient, proximate or decisive" cause of the collision, imputing a legal conclusion of sole responsibility, was rejected by VISCOUNT BIRKENHEAD, L.C., in his opinion in *Admiralty Comrs.* v. *S.S. Volute* (4), at pp. 141-144. He there pointed out that there are many B cases where the two negligences—that of the plaintiff and that of the defendant—are not synchronous, but successive and yet that in these cases it may be right for the court to hold both parties to blame, because, on the broad common-sense view, both contributed to the result. That *locus classicus* is so much quoted that I venture a parenthetical note, C in order to call attention to what is, I think, a printing error on p. 143, as it slightly affects the run of the sentence. The penultimate paragraph should apparently have been printed as part of the preceding sentence, following on a semicolon, and not as a separate paragraph, after a full stop. VISCOUNT BIRKENHEAD, L.C., was referring to cases where a decision D of one alone to blame would be justifiable. He, however, observes at p. 143:

> It would be difficult to find an instance of such a decision; but many decisions will be found of both to blame.

E He says in effect, at p. 144, that where a clear line cannot be drawn there are cases:

> in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule (12), might, on the other hand, invoke the prior negligence as being part of the F cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

I venture to add two final observations. The first is that the regime of the proportional rule has freed the Admiralty Court from an undue tempta- G tion to shut its eyes to minor degrees of negligence, involving, as was often the case under the half-and-half rule, an unjust degree of punishment. The second is that the spirit of the proportional rule, in my opinion, calls for the sort of wide view of joint responsibility which VISCOUNT BIRKENHEAD, L.C., thought right. Indeed, the remark of VISCOUNT BIRKENHEAD, H L.C., about the proportional rule which I have quoted seems rather to support what I have just said. Such a view of the proportional rule has a further advantage. I believe it would be consonant with the juridical attitude and practice of other nations, who are parties to the Collision Convention to which legislative effect was given in England by our Act of 1911. The object of that convention was to effect a step towards the international unification of maritime law, and the proportional rule was a most important feature of it. The maintenance of uniformity in the interpretation of a rule of law after its international adoption is just as important as the initial removal of divergence, but never easy to achieve. From my experience of the views of continental jurists about the proportional rule, I feel sure that the broad view of the proportional rule is their view and, if we maintain it here, we shall help to preserve that international uniformity which was the object of the convention. I do not, of course, suggest that we shall judicially mould English law by reference to foreign practice, but that we should, in a branch of law covered by international convention, preserve uniformity is an obvious advantage, if it is judicially possible.

In the present case, there was on the part of each ship a breach of good seamanship, which, as soon as the Eurymedon came within range of the Corstar, became a breach of definite duty by the one to the other. On the part of the Corstar, the breach was a combination, on the one hand, of initial carelessness in anchoring in such a position, and with such a length of cable, that, with the prevailing wind, the ship would obstruct that part of the fairway, which it was imperatively necessary should be kept unobstructed, because it was the usual route for traffic, both up and down, and, on the other, of a continuing subsequent failure to correct her position. I do not suggest that she could have corrected it *after* the Eurymedon began to get "into range," as I call it, but there was a breach of good seamanship in failing to do it earlier, and the effect of this could not be remedied when risk of collision had actually arisen. Once the Eurymedon was "in range," a duty to her arose, and the Corstar cannot escape blame in the Admiralty sense for the resultant collision. The negligence of the Eurymedon, on the other hand, as a continuing cause down to the collision, is self-evident. I think that this appeal should be dismissed with costs.

Appeal and cross-appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants); *Bentleys, Stokes & Lowless*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN BRITISH METAL CORPORATION, LTD., AND LUDLOW BROS. (1913), LTD., BRITISH METAL CORPORATION, LTD. *v.* LUDLOW BROS. (1913), LTD., HENRY GARDNER & CO., LTD. *v.* LUDLOW BROS. (1913), LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **November 29, 1937.**]

Arbitration—Appointment of arbitrators—Notice to parties—Appointment of third arbitrator—Umpire—Whether notice necessary—Custom—Arbitration Act, 1934 (c. 14), *s.* 4 (1).

A contract for the sale of goods was entered into "subject to the customary terms and conditions and subject to the rules and regulations of the London Metal Exchange, in so far as these rules and regulations do not conflict with the provisions of this contract." A dispute having arisen, the matter was referred to two arbitrators, who, having heard the parties, decided that it was necessary to appoint a third arbitrator. The third arbitrator did not hear the parties, nor was his appointment communicated to them, and they only became aware of it upon receiving the award. The rules of the London Metal Exchange provide that arbitrators may, after giving notice of their appointment, proceed in the absence of either or both parties. It was sought to set aside the award, because no notice of the appointment of the third arbitrator had been given to the parties. It was argued against this contention that the third arbitrator was, by virtue of the Arbitration Act, 1934, s. 4 (1), an umpire, and there was a custom for arbitrators to appoint an umpire without any notice to the parties to the arbitration :—

HELD : (i) sect. 4 (1) has no application to this case, as it deals only with cases where the agreement provides that the reference shall be to three arbitrators, and not to two with power to appoint a third.

(ii) when a third arbitrator is appointed, the arbitral tribunal then consists of all three, and, by the rules of the London Metal Exchange, the hearing must take place before them all.

(iii) it was therefore impossible to treat the award in this case as being the award of two arbitrators only, and it must be set aside.

Decision of CLAUSON, J. ([1937] 4 All E.R. 154) *affirmed.*

[**EDITORIAL NOTE.** In the arbitration here in question, after an original appointment of two arbitrators, a third was appointed. It was argued that, by the Arbitration Act, 1934, s. 4 (1), such third arbitrator is now an umpire. There is a power under the Arbitration Act, 1889, s. 6, for arbitrators, unless the contract provides otherwise, to appoint an umpire, and it has been the custom to appoint such an umpire, and for such umpire to act in the arbitration, without reference to the parties. The Court of Appeal have here held, affirming the judgment of CLAUSON, J., in the court below (reported in [1937] 4 All E.R. 154), that, where a third arbitrator is appointed—although he is now an umpire—the parties must receive notice of his appointment and his intention to act in the arbitration where the contract or rules provide generally for such notice in respect of arbitrators.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 644-649, paras. 1093-1099; and FOR CASES, see DIGEST, Vol. 2, pp. 401-406, Nos. 587-619.]

Cases referred to :

(1) *Re Smith & Service & Nelson & Sons* (1890), 25 Q.B.D. 545 ; 2 Digest 390, *498* ; 59 L.J.Q.B. 533 ; 63 L.T. 475.

(2) *White* v. *Sharp* (1844), 12 M. & W. 712 ; 2 Digest 464, *1097* ; 13 L. J. Ex. 215.

(3) *Eads* v. *Williams* (1854), 4 De G.M. & G. 674 ; 2 Digest 466, *1111* ; 24 L.J.Ch. 531 ; 24 L.T.O.S. 162.

(4) *Re Kitts & Murray, Wiles & Son, Ltd. & Cater & Co., Ltd.*, [1917] W.N. 4 ; 2 Digest 406, *618*.

(5) *Benabu & Co.* v. *Produce Brokers Co., Ltd.* (1921), 37 T.L.R. 851 ; 39 Digest 415, *487*.

(6) *Re Underwood & Bedford & Cambridge Ry. Co.* (1861), 11 C.B.N.S. 442 ; 11 Digest 193, *725* ; 31 L.J.C.P. 10 ; 5 L.T. 581.

APPEAL by the claimants from an order made by CLAUSON, J., on Oct. 22, 1937, and reported in [1937] 4 All E.R. 154.

A. T. Miller, K.C., and *J. Platts Mills* for the appellants.

R. A. Willes and *L. H. Gluckstein* for the respondents.

Miller, K.C.: The objection to the award is that, there being three arbitrators, two only had heard the argument. It is on this ground that the judge set it aside. In my submission, he was in error in so doing. The signature of Woolf should be treated as mere surplusage. It must be borne in mind that in these mercantile disputes there is always a desire on the part of the court to uphold the award if it can possibly do so. It is not misconduct for arbitrators to consult a disinterested third party. There was an award by the two arbitrators, who had validly heard the case. As they were agreed, and their agreement was binding, there was no point in arguing the matter again before a third. It is common practice for two arbitrators, after hearing the case, to appoint a third.

A further point that has to be considered is the effect upon the submission here of the Arbitration Act, 1934, s. 4 (1), (2). Sect. 4 (1) does not apply here at all, and it does not matter to us whether or not sect. 4 (2) applies. The courts will support the finding if they possibly can. In *White* v. *Sharp* (2), the arbitration was to be referred to three arbitrators and the award of any two was to be final. The award purported to be by all three, though in fact it was an award of two only. It was held to be good. The award in *Eads* v. *Williams* (3) was signed by the arbitrators and the umpire, and it was there held that it is no objection to an award that the arbitrators have asked the opinion of a third party. The cases of *Re Kitts & Murray, Wiles & Son, Ltd. & Cater & Co., Ltd.* (4) and *Benabu & Co.* v. *Produce Brokers Co., Ltd.* (5) serve to show that the right approach to cases of this kind is to uphold the award if possible, and one cannot attack the decision of an arbitrator by showing that he discussed the matter with others, or that someone who should not sign the award has done so. If sect. 4 applies, then this case is within the authorities I have read, and your Lordships will look to the substance of what has been done, rather than to the form. [Counsel referred to *Re Underwood & Bedford & Cambridge Ry. Co.* (6).] Sect. 4 does not apply. The parties have agreed to be bound by the customs of the Metal Exchange, and rule B contemplates one hearing only. If sect. 4 applies, and the third arbitrator becomes an umpire, the effect is that any valid award owes its validity to the two arbitrators, on the one hand, or to the umpire alone, on the other, so that this award is unaffected by sect. 4.

Platts Mills followed.

Willes, for the respondent, was not called upon.

A SIR WILFRID GREENE, M.R.: These two appeals raise the same point, and have been heard together. There is no need to refer to the facts of both of them; it will be sufficient if I take the case which stands first in the list, the case of the British Metal Corporation, Ltd. I may say that the respondent to the appeal is in each case the same, but the
B appellants are different, there being two contracts with different parties.

The contract in this case is dated Mar. 11, 1937, and is made between the British Metal Corporation, Ltd., the appellants, and Ludlow Brothers (1913), Ltd., the respondents. It is a contract for the sale by the British Metal Corporation of 50 tons of spelter to the respondents on customary
C terms and conditions, and subject to the rules and regulations of the Metal Exchange, in so far as they do not conflict with the provisions of the contract. There is a note upon the contract:

> Any dispute arising out of this contract is to be settled in accordance with the rules and regulations of the London Metal Exchange.

D A dispute did arise between the parties, and, accordingly, the relevant provisions of the rules of the London Metal Exchange came into operation. It is with regard to the true construction and operation of those rules that the present question arises. The relevant rule is rule B, in RULES AND REGULATIONS OF THE LONDON METAL EXCHANGE, 1935,
E pp. 21, 22. It is a long and complicated rule, but I need refer to one or two parts of it only. It begins by saying:

> All disputes arising as to the meaning of or under or in connection with contracts made subject to the rules of the London Metal Exchange, shall be referred to two arbitrators, one to be chosen by each party in difference, the said arbitrators having
F power to appoint a third arbitrator in case they shall deem it necessary.

Then, after setting forth that, in a case where the two arbitrators do not either make their award or choose a third arbitrator within one calendar month from the date of the appointment of the last of the two to be appointed, the committee can appoint a third arbitrator, there is
G this provision:

> The award in writing of the arbitrators or any two of them shall be made and delivered in triplicate to the secretary of the committee within a period of 30 days from the date of the appointment of the arbitrator last appointed. . . .

Then there is a discretionary power to enlarge the time, and then there
H is this provision:

> When there are three arbitrators a majority of them may extend the said period for delivery of their award for a further period or periods not exceeding 30 days.

Now there comes a paragraph which begins with the following words:

> The method of procedure upon an arbitration shall be as follows:—Within 7 days after the appointment of the last of two arbitrators each party shall deliver

> to the arbitrators, or either of them, a statement in writing of his case, with the originals or copies of any documents referred to therein, and shall at the same time furnish a copy of such statement to the other party.

Then, if a party makes default, the arbitrators may proceed without a statement from that party. Then comes this provision:

> The arbitrators shall, within a further period of 14 days, appoint a day and give notice in writing to the parties, who may, and, if required by the arbitrators, shall, attend and shall submit to examination by the arbitrators and produce such books and documents as the arbitrators may require always provided that in the discretion of the arbitrators an extension of this period may be allowed. Each party shall be entitled to produce verbal evidence before the arbitrators. Neither party shall, without the leave of the arbitrators, or the majority of them, be entitled to appear by counsel or solicitor or other representative.

Then there is a power in the arbitrators to adjourn the hearing from time to time. I think those are all the provisions of the rules which I need read.

In the present case, the parties appointed each a skilled gentleman to act as their arbitrator. Mr. Davey was appointed by the British Metal Corporation, Ltd., and Mr. Smith was appointed by Ludlow Brothers, Ltd. At a certain stage in the proceedings—namely, after a full hearing—those two arbitrators proceeded to appoint Mr. Woolf as a third arbitrator. He was the chairman of the committee of the London Metal Exchange, and Mr. Davey in his affidavit, after explaining the qualifications of Mr. Woolf, said:

> At a hearing with that gentleman we laid before him all the material documents and contentious facts which had been presented to us and thereafter all three of us unanimously agreed upon settled and signed the award the subject of these proceedings.

The present proceedings originated in an application by the present respondents to have the award set aside upon the ground that there was improper conduct on the part of the arbitrators in the sense that, whereas under the rules where there are three arbitrators, so it was said, there must be a hearing before the three of them, in the present case there has been a hearing before two only, and the third arbitrator has performed his functions without having been present at any hearing of the arbitration. CLAUSON, J., agreed with the contention of the respondents, and set aside the award upon the ground which I have stated.

The question, to my mind, is a simple question of the construction of this rule. Mr. Miller impressed upon the court the desirability of interfering as little as possible with the activities of commercial men under arbitration clauses, and called attention to various authorities which suggest that the court will look with an indulgent eye upon apparent irregularities in procedure, in which there is no real substance. In my opinion, this is not a matter of irregularity, but is a matter of substance. Whatever may be the merits of any particular case, and however little harm may be done by a particular departure from the rules laid down, the necessity of adhering to rules laid down in contracts is just as much an interest of the commercial community as it is that their disputes should be decided expeditiously by an informal and business tribunal which they choose to appoint.

Before coming to examine the construction of the relevant passages, which I shall be able to do quite shortly, I wish to put out of the way one matter. It was, I think, assumed by CLAUSON, J., that the pro-
A visions of the Arbitration Act, 1934, s. 4 (1), applied to this case. It is not surprising that he should have assumed it without any argument, because both counsel appeared to have agreed before him that the case was one to which the subsection applied. Sect. 4 (1) is as follows:

> Where an arbitration agreement provides that the reference shall be to three
> B arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

In my opinion, that subsection does not apply to this case, and for this short reason, that in terms it is confined to the case where the agreement
C provides that the reference shall be to three arbitrators—that is to say, a case where the tribunal is necessarily and compulsorily a tribunal of three. That that is the true meaning of the subsection I think will appear when it is compared with the Arbitration Act, 1889, s. 5 (*c*), which deals with the case where the two parties or two arbitrators are at
D liberty to appoint an umpire or third arbitrator, and do not appoint him, in which case there is machinery, with the power of the court as the last resort, for appointing such a third arbitrator. That provision deals with the case where there are two arbitrators, with power in them to appoint a third. Sect. 4 (1) of the Act of 1934 deals with the case,
E not where there are two arbitrators with power to appoint a third, but where the submission itself provides that there shall be three. That indeed is in accordance with what appears to be the recognised mischief which this section was aimed at remedying, because it had been held, in *Re Smith & Service & Nelson & Sons* (1), that, in a case where the
F arbitration agreement provides for there being three arbitrators—that is to say, a compulsory tribunal of three, one to be appointed by each party and the third to be appointed by those two—the court, in case of difference, had not the power to remedy the breakdown, and appoint that third arbitrator, as it would have had the power to appoint an
G umpire if the agreement had provided for an umpire. It was only in the case where the agreement provided for there being three arbitrators that such a deadlock arose in view of the circumstance that sect. 5 (*c*) of the Act of 1889 already empowered the court to deal with the case where two arbitrators had power to appont a third arbitrator. Now,
H the case which we have before us is exactly of the latter description, two arbitrators with power in them to appoint a third, and, in my judgment, sect. 4 (1) does not apply to the case.

Turning back to the construction of rule B, it appears to me really clear beyond doubt that the provision in this rule with regard to a hearing before the arbitrators must be read as applying to the arbitral tribunal as in fact constituted. If the two arbitrators never appoint a third, they are the arbitrators for the purpose of these provisions. If, on the other hand, they appoint a third before they start upon the reference, the three will be the arbitrators for the purpose of these provisions. If they appoint an arbitrator after having proceeded some distance with the arbitration, the arbitral tribunal will then consist of the three. I can see no escape from that construction, and, if that be right, it follows that the provisions with regard to the hearing of the arbitration must, in a case where a third arbitrator is appointed, be read in reference to that tribunal, and that the hearing which is contemplated must take place before that tribunal.

In the present case, there was never any hearing at all before that tribunal. There was a hearing before a different tribunal, consisting of the two. Directly the third was appointed, a new tribunal came into existence, in reference to which these directions must be obeyed. If a third arbitrator is appointed halfway through a hearing, it would be manifestly odd if a contract were to provide—and this was pointed out by ROMER, L.J.—that a third arbitrator could come in in the middle without any right on the part of the party who had already addressed the original two to place his contentions before the third in his own way and in his own language. In the present case, each party was at the same disadvantage, in the sense that the third arbitrator had heard neither of them. But it appears to me, as I have said, that the language of this clause quite clearly contemplates the necessity of a hearing before the tribunal of three, if the tribunal of three ever comes into existence. I appreciate the inconvenience that may be caused by having to have a re-hearing. That inconvenience is caused by a combination of two things: (i) the language in which the rules are couched, and (ii) the fact that the two gentlemen concerned in this case took, at the beginning of the arbitration, too rosy a view of its difficulties. Mr. Davey's affidavit suggests very clearly, to my mind, that the two had in fact differed, and that that was the reason why they thought it necessary to call in Mr. Woolf. If they had appreciated the probability of their differing, or the difficulties of the case, they no doubt would have avoided the delays of a second hearing by appointing the third arbitrator at the outset.

Mr. Miller took two points in the course of his argument. He said that, in the circumstances, Mr. Woolf's signature to the award can be treated as mere surplusage, because the rules provide that, where there are three arbitrators, the award of two is sufficient. But the vice of this matter goes very much deeper than that. It goes, not to the form of the award, or the signature to the award, or anything of that kind, but to the necessity for a hearing before a valid award can be made at all. Once it is ascertained that the tribunal is a tribunal of three, and once it is decided that the rules provide that that tribunal shall hear the case, it is quite impossible to treat this award as an award of two, because the award has been arrived at otherwise than in the manner contemplated by the rules, since the parties are entitled under these rules to have the matter heard by all members of the arbitral court, who can then consult together. That has never been done in this case, and that is, to my mind, very far from being a matter of mere formality. The other argument was that the third arbitrator can be treated like a third party who has been called in by the arbitrators to assist them in their deliberations. That argument again is one which I think is answered by precisely the same point, that, whatever the rights of arbitrators may be informally to obtain assistance from skilled persons whom they may consult, that is a totally different thing from a hearing by a tribunal, the contractual tribunal to which the parties have agreed to have resort.

That, I think, deals with all the points. As I have said, the matter is, to my mind, a matter simply and solely of the construction of these rules, and, once it is decided that, upon the true construction of these rules, the hearing must be before three where there are three, the matter comes to an end. As I have said before, I regard that as a matter of substance, and not as a matter of mere irregularity. Therefore the appeal must be dismissed.

ROMER, L.J.: I agree. From the moment that Mr. Davey and Mr. Smith made up their minds that the appointment of a third arbitrator was necessary, and appointed Mr. Woolf as such third arbitrator, the reference became a reference to three named arbitrators, and the arbitration had to be conducted on that footing. It follows, in accordance with the rules to which our attention has been called, that the three arbitrators should then have appointed a day for hearing, and given notice in writing to the parties, who would then have been at liberty to attend before the arbitrators, to bring their witnesses and their documents and so on. That was not done, and, that being so, it appears to me that this award is necessarily bad, and that the judge was quite right in setting it aside.

MACKINNON, L.J.: I agree, though with some regret. If the award to which the appellants are objecting had been signed by Mr. Davey and Mr. Smith only, these proceedings would have had merit as well as correctness. In fact, it was signed by Mr. Davey, Mr. Smith, and Mr. Woolf. I am constrained to agree that, in the circumstances, the appellants are not entitled to succeed, but I cannot forget that, if Mr. Woolf had not put his signature to this document, it would, when signed by Mr. Davey and Mr. Smith, have appeared to be a perfectly good and unimpeachable award, and these proceedings would never have taken place. That is why I feel some regret, though I have to agree.

Appeal dismissed with costs.

Solicitors: *Linklaters & Paines* (for the appellants); *Peacock & Goddard*, agents for *Shakespeare & Vernon*, Birmingham (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

LONG *v.* G. F. KIRK & CO., LTD.

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 11, 1938.**]

Factories and Workshops—Building in course of construction—Electrical wiring—Breach of regulations—Imperative nature of regulations—Factory and Workshop Act, 1901 (c. 22), *ss.* 79, 136—*Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy* (*S.R. & O.* 1908, *No.* 1312), *reg.* 2—*Building Regulations*, 1926 (*S.R. & O.* 1926, *No.* 738), *reg.* 45.

The respondents were charged, as the occupiers of certain premises in the course of construction, with failing to have properly covered with insulating material the lead to a portable electric lamp, and with failing so to place and safeguard that lead as to prevent danger, so far as reasonably practicable, contrary to the Building Regulations, 1926, and that, in consequence of such neglect, a labourer employed by the respondents had been killed. The justices dismissed the informations, on the ground that the leads were supplied and intended by the respondents for use as a "hanging" cable, and not as a "trailer"; that the leads were of the type usual for such purpose, and had been passed by the local electrician for such purpose; that the leads had been repaired with adhesive tape, where necessary; and that the accident had happened at night when the labourer himself, without authority, fetched the lamp from the boiler house, and, instead of hanging it up, trailed it through the wet, and received a fatal shock. The regulations require an electrical conductor to be covered with insulating material where necessary to prevent danger, and to be so placed and safeguarded as to prevent danger where reasonably practicable:—

Held: the regulations were imperative, and required the occupiers so to place and protect the wires that there was no danger to any person employed. The facts proved showed a breach of the regulations.

[**EDITORIAL NOTE.** Regulations have been made which require that electric wires shall be covered with insulating material, where necessary, to prevent danger to employees, and it is here held that these regulations place upon the employer an absolute duty to secure the safety of the employees. In the present case, it will be noticed that the wire in question had recently been passed by a local authority supplying electricity, though there was evidence that it had been patched with insulating tape in several places. It further appeared that the employee was using the light for a purpose other than that intended, but these matters are not available as a defence to the employers, the words of the statute being held to be imperative. The decision in this case follows the same lines as those relating to the fencing of dangerous machinery, but no case relating to the insulation of wiring has previously been reported.

As to Building Regulations, see HALSBURY, Hailsham Edn., Vol. 14, pp. 621, 622, para. 1175; and for Cases, see DIGEST, Vol. 24, p. 919, Nos. 135-138.]

Appeal by way of case stated from the decision of the justices of the borough of Oldham. The respondents were carrying out certain reconstruction work at the Grand Theatre, Oldham. These premises constituted a building in course of construction, and were a factory within the meaning of the Factory and Workshop Act, 1901, s. 105, and the respondents were the occupiers thereof within the meaning of sect. 105. On Feb. 3, 1937, a night-shift of 6 men, divided into two gangs, was working by the aid of an acetylene flare. The flare was burning weakly, however, and Furlong, who had no instructions or authority to handle or use any of the electrical apparatus in the building, went to the boiler house to bring an electric hand-lamp, which he had seen hanging there, on to the work. This lamp was connected with the A electric system by a pair of leads 65 ft. long and an adaptor inserted into a pendant lampholder located in a passage two floors above, and was controlled by a tumbler switch on the wall in a passage one floor above. The leads ran down four flights of stairs from the pendant lampholder. Furlong was found, a few minutes later, holding the leads B in his left hand about 10 ft. from the end where the hand-lamp was fitted, and a length of the leads was wound round his left hand. He was found to be dead, having been electrocuted. The leads had been used on a similar work elsewhere, where they had been passed by the local electricity department. The respondents' foreman had examined C the leads from time to time, and had patched them with insulating tape when he considered it necessary to do so, but he had no particular knowledge of electricity, nor was he ever asked by the respondents whether he had any such knowledge. The leads had been examined by the foreman about 7 hours before the accident, when, according to his D evidence, they were in proper condition, but, on examination after the accident, it was found that they had been repaired with insulating tape in 16 places, and in one place with a piece of rag. Approximately 23 ft. of the leads was found to be wet, and it was noticed that there were pools of water in the passage.

E The appellant contended that the lead in question was an electrical conductor, and was not so installed and protected as to prevent danger to any person employed, and was not covered with insulating material where necessary to prevent danger, and was not so placed and safeguarded as to prevent danger so far as reasonably practicable, and that, in consequence F of these matters, the labourer was killed.

The respondents contended (i) that they did not provide the leads for portable use, and that the leads were in fact suitable for the purpose for which they were intended to be used, and, except at the point where they were wrapped with rag, were covered with insulating material, G and installed and protected so as to prevent danger, and (ii) that there was evidence that, when the foreman examined the leads on the evening of the accident, they were not wrapped with rag, and were not defective, and that the leads had been provided for use in connection with a hanging light.

H The Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy (S.R. & O., 1908, No. 1312), reg. 2, provides as follows:

> All conductors shall either be covered with insulating material, and further efficiently protected where necessary to prevent danger, or they shall be so placed and safeguarded as to prevent danger so far as is reasonably practicable.

The Building Regulations, 1926 (S.R. & O., 1926, No. 738), reg. 45, provides as follows:

> . . . All electrical apparatus and electrical conductors shall be so installed and protected as to prevent danger to any person employed.

Valentine Holmes for the appellant.
John Maude for the respondents.

LORD HEWART, L.C.J.: This is a case stated by five lay justices of the borough of Oldham in Lancashire. It arises out of four informations under the Factory and Workshop Acts, whereby the respondents were charged with a series of offences, as a result of which a man named Patrick Furlong was killed. These lay justices, having heard evidence, dismissed the informations, and the question for us is whether, in holding as they did that no offences had been committed, they came to a correct determination in point of law.

Mr. Maude has said all that can be said in explanation or extenuation of the view which the justices have expressed, but in truth and in fact the case is really too clear for argument. I need not repeat the facts which are found. This unfortunate man was killed because he took hold of an electrical conductor which was not insulated, an electrical conductor upon a lamp on the premises where he was employed to work. The requirements of these regulations are, as might be expected, imperative. First of all, it is provided that:

> All conductors shall either be covered with insulating material, and further efficiently protected where necessary to prevent danger, or they shall be so placed and safeguarded as to prevent danger so far as is reasonably practicable.

It says "either be covered with insulating material . . . or . . ." What is the meaning of those words? "Covered with insulating material" means adequately covered with insulating material of such quality and thickness that there is no danger, not that there is what some people may think to be a moderate amount of danger to somebody else, but that there is no danger. We know from the facts of this case that what happened was that patches were put upon the wire, to use the very phrase that is found, "when the respondents' foreman considered it necessary to patch." The other regulation which is in question is no less imperative and unqualified. It says:

> . . . All electrical apparatus and electrical conductors shall be so installed and protected as to prevent danger to any person employed.

It does not say "to modify or to render less probable or less grave," but "to prevent." The justices ask whether they have come to a correct determination in point of law. In my opinion, they have come to a wrong determination in point of law.

BRANSON, J.: I agree, and have nothing to add.

HUMPHREYS, J.: I agree.

Appeal allowed with costs, and case remitted to justices with a direction that the offences charged were proved.

Solicitors: *Treasury Solicitor* (for the appellant); *Mott & Parkes* (for the respondents).

A [*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re HARKER'S WILL TRUST, HARKER *v.* BAYLISS.

B [CHANCERY DIVISION (Simonds, J.), **December 15, 1937.**]

Settlements—Tenant for life and remainderman—Sale of larch trees—Right of tenant for life to purchase money—Sale in proper course of management.

The tenant for life in possession of certain settled property in Cumberland and Westmorland entered into a contract for the sale of certain C larch plantations for £1,407. The trees were duly felled and carried away, and there arose for determination the question whether the purchase price was wholly payable to the tenant for life or whether some part of it should be treated as capital. Larch is not timber at common law, nor according to the custom in Cumberland or Westmorland, and the will creating the settlement provided that the trustees were to cultivate and manage the estate according to the custom of the district, with D full discretionary powers of cutting timber and underwood for sale, repairs, or otherwise. At the time the larch trees were cut, they were mature and ripe for cutting:—

HELD: the trees having been felled in the ordinary course of management of the property, the whole of the purchase money was payable to the tenant for life, and she was under no obligation to replant the E property with a similar plantation.

[**EDITORIAL NOTE.** Oak, ash and elm are timber by common law, but other trees can be timber only if there is a custom of the country to that effect. A tenant for life is entitled to the purchase money upon the sale of trees if they are sold in the proper course of estate management, that is to say, when they are mature F and ripe for cutting, for then no question arises of any act of waste upon the part of the tenant for life. It may be otherwise where the trees are cut before the time for felling is come, *e.g.*, owing to the national need or to the increased price which may be obtained in time of war or emergency.

AS TO TREES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 431-433, paras. 737, 738; and FOR CASES, see DIGEST, Vol. 2, pp. 79-87, Nos. 585-681.]

G Cases referred to:

(1) *Re Harrison's Trusts, Harrison* v. *Harrison* (1884), 28 Ch. D. 220; 2 Digest 87, *681*; 54 L.J. Ch. 617; 52 L.T. 204.

(2) *Re Terry, Terry* v. *Terry* (1918), 87 L.J. Ch. 577; 2 Digest 103, *842*.

(3) *Honywood* v. *Honywood* (1874), L.R. 18 Eq. 306; 2 Digest 104, *843*; 43 L.J.Ch. 652; 30 L.T. 671.

H (4) *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; 2 Digest 90, *712*; 60 L.J. Ch. 809; 65 L.T. 811.

(5) *Re Trevor-Batye's Settlement, Bull* v. *Trevor-Batye*, [1912] 2 Ch. 339; 2 Digest 90, *713*; 81 L.J.Ch. 646; 107 L.T. 12.

ORIGINATING SUMMONS asking for the determination of the following questions: (i) whether according to the true construction of the will,

dated Dec. 19, 1913, of the testator, Joseph Simpson Harker, the whole
of the sum of £1,407, being the proceeds of sale of certain larch trees
growing upon the testator's Crosthwaite and Tower Estates, ought
to be paid to the defendant Margaret Muriel Bayliss as the tenant for
life under the will; or (ii) whether the said sum ought to be apportioned,
and, if so, how, and in what manner, between capital and income. The A
testator died on Nov. 16, 1914, and his will was proved on May 7, 1915.
On Aug. 22, 1935, the tenant for life entered into an agreement for the
sale of the larch trees, which were then fully mature, and they were
felled and carried away accordingly. The tenant for life did not desire
that the plantations should be replanted. B

Nigel Warren for the plaintiffs, the trustees of the will.

Hon. Denys Buckley for the first defendant, the tenant for life of
certain land settled by the testator.

M. R. C. Overton for the remaining defendants, who are entitled in
remainder after the death of the first defendant. C

Buckley: The property in the trees is in the tenant for life. If a
testator leaves a property in the course of a particular kind of cultivation,
it is presumed that he intended that course to be continued
and the proceeds of such cultivation to go to the person entitled to the
profits. Larch trees are not timber at common law, and a tenant for D
life can do what he likes with trees which are not timber, although if
he cuts them otherwise than in the ordinary course of good forestry
he is liable to an action for waste. The proceeds of this sale are exactly
what, by the terms of the will, are given to the tenant for life, and I
ask the court to say that the tenant for life is entitled to the whole. E
[Counsel referred to *Re Harrison's Trusts, Harrison* v. *Harrison* (1),
Re Terry, Terry v. *Terry* (2), *Honywood* v. *Honywood* (3), *Dashwood* v.
Magniac (4).]

Overton: The cost of re-planting ought to be deducted and treated as
capital. Alternatively, there ought to be treated as capital such a sum, F
after the cost of replanting, as will produce £1,400 at the end of 40 to
50 years, as the proper course is to treat the crop as one which matures
within that time. The trees which were cut down were said to be 42
years old. There should be treated as capital a sum which would at
4 per cent. interest amount to £1,400 in 40 years. This tenant for life G
was not acting in due course of management. If the trustees were in
possession, it would be their duty to replant the plantation, because
they would have to manage the estate for the benefit of those entitled
in remainder. [Counsel referred to *Re Trevor-Batye's Settlement, Bull*
v. *Trevor-Batye* (5).] H

SIMONDS, J.: This case raises a somewhat curious point. The
relevant facts are these. The testator, one Joseph Simpson Harker,
made his will on Dec. 19, 1913, and thereby devised and bequeathed
certain freehold and customary lands, tenements, stints or cattlegates

and hereditaments situate in various townships and parishes in the counties of Cumberland and Westmorland, together with his flock or flocks of heaf-going sheep upon the same estates, to his trustees upon trust, during the life of his daughter Mary Harker, to cultivate and manage them according to the custom of the district, with full discretionary powers of cutting timber and underwood for sale, repairs or otherwise, of repairing and insuring houses, of employing servants, and so on, and generally of dealing with the premises and flock or flocks of sheep as though they were the absolute owners thereof. Then they were given power, upon the daughter attaining a certain age, to let her into possession of the premises, including the flocks of sheep. The testator made a devise of certain other estates, therein called his "Crosthwaite and Tower estates," with the flock or flocks of heaf-going sheep on the said estates, to his trustees upon the like trusts and subject to the like powers and provisions in favour of his daughter Margaret Muriel Harker, by reference to the trusts declared in favour of Mary Harker which I have read. The testator died on Nov. 16, 1914, and his will was duly proved on May 7, 1915. In due course his daughter Margaret Muriel attained the age of 25 years, and was in 1925 let into possession of the Crosthwaite and Tower Estates. She married and had children, who, subject to their attaining the age of 21 years or becoming married, will be entitled to vested estates of inheritance in the property. They, and other persons entitled contingently in reversion, are respondents, together with the tenant for life, to this summons.

Part of the estates comprised certain larch plantations, and the tenant for life, being in possession, on Aug. 22, 1935, entered into an agreement for sale of these larch plantations for the sum of £1,407. The purchaser in due course entered upon the property and felled and carried away the larches which he felled. I suppose, since some question appeared to arise as to who was entitled to the purchase money, it was paid, not to the tenant for life, but to the plaintiffs as trustees of the will. The plantations were planted before the testator's death. They had been planted, according to the evidence of one of the plaintiff trustees, Mr. Reed, some 42 years ago, and, at the time of the agreement of 1935, they were ripe for felling in the ordinary course of management. The same deponent tells the court this:

> Larch trees cannot be treated as a crop; they do not grow again from the stock like ordinary coppice, and when once cut there is an end to the trees. . . . According to the custom of the district, the young trees are pruned and thinned for the first 15 years after having been planted, during which period there is no profit from them. When they attain the age of 15 years they are regularly thinned in order to allow the proper growth of the trees not cut. For about 5 years the thinnings are of comparatively little value, but when the trees are about 20 years old the thinnings are sold for fencing purposes. In another 10 years the remaining trees begin to mature and become fit to be used as pit-wood for the iron-ore mines. When the trees have reached the age of from 40 to 50 years, they begin to decay, and it then becomes necessary to clean the plantation, and (if so desired) to replant the site, when the same process as above mentioned is repeated.

Then he says that the custom of management which he has described has been practised in respect of the plantations in question, and he further says:

> The average income derived from the thinnings of the said plantations has been insufficient to defray the expenses of management since the death of the testator. A

He goes on to say what I have already stated, that, at the date of felling, the trees were mature and ripe to be cut.

In these circumstances, the question which arises is whether the tenant for life, who has been let into possession and entered into this contract for sale, is entitled to the whole of the proceeds, £1,407, or B
whether some, and, if so, what, part of it ought to be treated as capital of the estate. It is to be observed that larch is not timber either at common law or by the custom of Cumberland and Westmorland, in which counties these properties are situate. If larch is not timber, and it is not, then it appears to me to follow as a matter of law that, in C
the absence of any special provision in the will or other disposition affecting the property, a tenant for life who cuts it in due course of management of the estate is entitled to retain for his own use the whole of the proceeds of sale. There is neither at common law nor in equity any rule which prevents a tenant for life, who cuts in due course wood D
which is not timber, from retaining the whole of the proceeds. The analogy is, I think, a good one to the case of an open mine, as to which again in law the tenant for life is entitled to receive the whole of the proceeds of working. Of course, if a tenant for life improperly cuts wood which is not timber—that is to say, cuts it before it is ripe for E
felling—then no doubt he is liable to an action in the nature of waste, for he has not done that which is right and proper as between himself and the persons entitled to the inheritance of the estate. Also, I think that it is clear from the authorities which have been cited to me that, if some accident intervenes—that is to say, if there is a great storm by F
reason of which a plantation is laid low before the time has come for felling—or if, again, by an accident of any kind such as a great war, there are created peculiar exigencies in the timber trade, so that it becomes desirable to cut and sell wood at a time at which it is not ordinarily ripe for cutting, then equity will intervene, and will decree G
that some part of the proceeds of the wood thus fortuitously sold should be retained for the benefit of the inheritance. That is a course which was followed in the cases of *Harrison* (1) and *Terry* (2), to which I have been referred, where, as I think FRY, L.J., said, the principle that the court of equity will intervene to prevent an accident altering the relationship H
of the parties was applied. In this case it is clear from the facts that, in the absence of any special provision in the will, the tenant for life is entitled to the whole of the proceeds of sale of the larch plantations properly cut by her. Is there anything, then, in the provisions of the will which compels me to come to a different conclusion?

I think not. The terms of this will provide that the trustees are to cultivate and manage the estate:

> according to the custom of the district with full discretionary powers of cutting timber and underwood for sale repairs or otherwise.

I find nothing in that which will deprive the tenant for life, when she
A has been let into possession and when she is, I will assume, under the same obligation of cultivating and managing the estate, of the right to receive the whole of the rents and profits derived from the sale of these plantations. I think that it would be quite wrong for me to assume that, if she does not think fit to replant, she is guilty of any form of
B waste or mismanagement of the estate. She is *prima facie* entitled, in my view, to receive the profits, and I am not, I think, justified in saying that any part of those profits ought to be retained or taken from her because it might possibly be said—I know not with what justice—that she ought to replant the property with a similar plantation. I should
C be assuming, if I did that, that she was guilty of something in the nature of waste, something in the nature of mismanagement of the property, if she failed to replant. I am not entitled, I think, to make any such assumption. In my view, she is entitled to receive the whole of the rents and profits—that is to say, in this case to receive the profits
D of that which she was entitled to sell. I cannot hold that she was under any corresponding obligation to replant, so as to justify me in applying some equity and in saying that a part of the proceeds of sale ought to be taken from her. In those circumstances, I shall declare, in answer to the question which the summons asks, that the whole of the sum of
E £1,407 ought to be paid to the defendant Margaret Muriel Bayliss as the tenant for life under the will.

Declaration that the whole of the sum of £1,407 *be paid to the defendant Margaret Muriel Bayliss as tenant for life under the will.*

Solicitors: *Beachcroft, Wakeford May & Co.*, agents for *Little & Co.*,
F Penrith (for all parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BRITISH SUGAR MANUFACTURERS, LTD. *v.*
G
HARRIS (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), **December 15, 16, 1937.**]

Income Tax—Business—Deduction—Percentage of net profits payable to
H *another company in consideration of giving benefit of experience.*

By an agreement made between the appellant company and two other companies, those two companies were to be entitled in each of four years to receive between them, and in such proportions as they should mutually agree upon, 20 per cent. of the net profits of the appellant company in consideration of their giving to the appellant company the full benefit of their technical and financial knowledge and experience, and giving to the appellant company and its directors advice to the best of their ability respectively on all questions of, or relating to, the manufacture and finance and disposal of the appellant company's products. The appellant company was not to be liable to pay any remuneration to the directors nominated by one of the other companies beyond their fees as directors and their travelling and other expenses. The net profits were to be arrived at after payment of all expenses of the appellant company and after providing for interest on debentures, but before making any provision for depreciation. The appellant company claimed that a payment made under the agreement was an admissible deduction in computing the appellant company's profits for the purpose of assessment under Sched. D, Case I :—

Held : the payment was in respect of services rendered to the company and was accordingly a proper deduction of expenses in computing the profits of the appellants.

Decision of Finlay, J., ([1937] 3 All E.R. 702) *reversed.*

[**EDITORIAL NOTE.** The judgments in this appeal consider the statement in the judgment of the Privy Council in the *Pondicherry* case (4) that " a payment out of profits and conditional upon profits being earned cannot accurately be described as a payment made to earn profits." This was later explained in *Adamson* v. *Union Cold Storage Co., Ltd.* (2) to refer to a case where profits have to be ascertained after providing for all outlays incurred in earning them ; and the apparent differences in the decisions in the decided authorities were later explained by the different meanings to be ascribed to the word " profits " by Lord Maugham in *Indian Radio & Cable Communications, Ltd.* v. *Income Tax Comr.* (3). Though the decision of Finlay, J., is reversed the result reached is one to which Finlay, J., would have come, had he not felt himself bound by authority to come to the contrary decision.

As to Trade Expenses, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320 ; and for Cases, see DIGEST, Vol. 28, pp. 42-45, 50, 51, Nos. 215-226, 255-260.]

Cases referred to :

(1) *Last* v. *London Assurance Corpn.* (1885), 10 App. Cas. 438 ; 28 Digest 58, *297* ; 55 L.J.Q.B. 92 ; 53 L.T. 634 ; 2 Tax Cas. 100 ; *varying* (1884), 14 Q.B.D. 239.

(2) *Adamson* v. *Union Cold Storage Co., Ltd.* (1931), 146 L.T. 172 ; Digest Supp. ; 16 Tax Cas. 293.

(3) *Indian Radio and Cable Communications Co., Ltd.* v. *Income Tax Commissioner, Bombay Presidency and Aden,* [1937] 3 All E.R. 709 ; Digest Supp.

(4) *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comrs.* (1931), 58 L.R. Ind. App. 239 ; Digest Supp.

Appeal by the British Sugar Manufacturers, Ltd., from an order of Finlay, J., dated June 23, 1937, and reported in [1937] 3 All E.R. 702.

Cyril King, K.C., and *Frederick Grant* for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the respondent.

Sir Wilfrid Greene, M.R. : The appellants in this case made an agreement on May 18, 1926, with a foreign company called Skoda Works and another company, an English company, called British and Allied Investments Corpn., Ltd., which in the agreement is called " the corporation." That agreement dealt with a certain financial reorganisation of the appellant company, which had not prospered in its business and had become indebted to the Skoda company, but I do not think it necessary to refer to any part of that agreement except one clause, because it appears to me that that clause is dealing with a particular subject-matter which does not require any reference to the other parts of the agreement. That clause is cl. 11, and it provides for the performance of certain services by the Skoda company and by the corporation to the appellants, and, as the whole question in this case, upon the first point that arises, turns upon the true view of the effect of that clause, I will read it :

> In each of the 4 years ending Mar. 31, 1927, 1928 and 1929 and 1930 Skoda Works and the corporation shall be entitled to receive between them and in such proportions as they shall mutually agree upon 20 per centum of the net profits of the company in consideration of their giving to the company the full benefit of their technical and financial knowledge and experience and giving to the company and its directors advice to the best of their ability respectively on all questions of or relating to manufacture and finance and disposal of the company's products, provided that the company shall not by reason of this clause be liable to pay any remuneration to the directors nominated by Skoda Works beyond their fees as directors and their travelling and other expenses. Such net profits shall be arrived at after payment of all expenses of the company and after providing for interest on the said debentures but before making any provisions for depreciation and in case of any dispute as to the amount of such net profits the certificate of the auditors for the time being of the company shall be final and binding on all parties.

The two companies concerned, the Skoda company and the corporation, performed services under that agreement. The precise manner in which the sum payable under the agreement was divisible between them is not, in my opinion, a relevant matter. They performed services, and they received sums from the company. The company claimed to be entitled, for the purposes of its assessment under Case I of Sched. D, to treat the sums so paid, to quote the language of r. 3 (*a*) of the rules applicable to Cases I and II, as expenses :

> being money wholly and exclusively laid out or expended for the purposes of the trade.

The first matter that came before the special commissioners in connection with that claim related to the year 1931-32 only, but, subject to the second point in the case, the decision with regard to that year governs the similar point raised by assessments in respect of the three previous years. There is one point in the case upon which no stress has been laid, but I mention it in order to get rid of it. There was a suggestion, and indeed there is a finding, that the payment in the year in question was "in part a payment for services of a capital nature." That appears to be based on the fact that in that year the Skoda company assisted the appellants with their advice in connection with certain extensions of and improvements to the appellants' factory. No point was made on this, and it was not suggested on behalf of the Crown that any apportionment ought to be made, assuming that the appellants were right on their main contention. I therefore do not treat that matter as being of any importance, but, in saying that, I am not to be taken to assent to the proposition that the character of the work with regard to which the advice was given would prevent the remuneration attributable to it from being a deductible expense. There is no need to go into that question.

The special commissioners, apparently with some hesitation—in fact, they say "with some hesitation"—came to the conclusion that the sum was not a deductible sum, because they held it to be a distribution of profits. FINLAY, J., against what was the inclination of his own mind, A
but conceiving himself to be constrained by authority, upheld the decision of the special commissioners. I have come to the conclusion that the view which FINLAY, J., but for the authorities, would clearly himself have taken is the right view. It appears to me that, when the true nature of this provision is appreciated, it is not possible to avoid B
the conclusion that it is an agreement for remuneration by way of a commission representing a percentage of profits for services to be rendered to the company. In other words, it is nothing more nor less than a very common type of agreement, under which officers of companies are remunerated by a commission on profits, which, after all, is C
nothing more than a share of profits, provided that the word "profits" is construed in the right sense. Some suggestion was made by the Attorney-General that the absence of a fixed salary in addition to commission affected the matter. I am unable to see that. I can see no reason at all in principle why a contract providing for remuneration by D
commission and nothing else should not produce the result that the sum payable under it to the employee is a proper deduction.

The matters to be observed in this case are, first of all, the nature of the work that is being done. The nature of the work that is being done is what one may succinctly describe as ordinary management work, E
or ordinary advisory work in respect of technical matters. The next point to observe is that what is referred to as "net profits" is a figure to be arrived at upon a conventional basis, not the basis upon which the company would ascertain its profits for commercial purposes, nor the basis upon which it would ascertain its profits for income tax purposes, F
although, speaking for myself, I think that the latter consideration is not one of any importance. But it is an important factor to be considered (although I agree not necessarily conclusive in any individual case) that the fund of so-called profits, to 20 per cent. of which the companies are to be entitled for their services, is a fund ascertained by G
means of a conventional account between the parties.

Now, bearing all those things in mind, the question arises: On which side of the line does the case fall? I quite accept the proposition that there is a line between a contract for a payment of a share of profits *simpliciter* and a contract for a payment of remuneration which is H
deductible in truth before the profits divisible are ascertained. That line in some cases may be very difficult to draw. The well-known case of *Last* v. *London Assurance Corpn.* (1) is a very good example of that, when the division of judicial opinion upon it is considered, but the reason why *Last's* case (1) fell upon the side of the line that it did, appears

from one word in the judgment of LORD BLACKBURN. Speaking of the policy-holder, LORD BLACKBURN says :

> If he dies before the quinquennial period arrives he gets nothing, but if his policy is still in force he has, I cannot but think, purchased a share in the profits, if any, earned during those five years.

A That was what in *Last's* case (1) had happened. The policy-holder was treated as having purchased a share of profits. If a person purchases share of profits, of course, the profits paid to that person cannot be rejected. That is quite obvious.

In the present case, there is nothing approaching a purchase of a share B of profits in that sense. It is not cash that passes in exchange for these profits ; it is services, and the badge of such a contract is remuneration for services. Therefore, the first thing that this remuneration would certainly not be is a share of profits purchased by the employee. Again I quite accept the proposition that the mere circumstance by itself that C services are rendered may not be conclusive. I can conceive of a case where a person contributes services to some sort of joint adventure, while others contribute perhaps capital, land, plant and goods, arranging among themselves (it may be something short of a partnership) that nobody shall get anything until the pool of profits is ascertained, and D that then they shall divide it up between them in specified proportions. That, it seems to me, would be a real agreement for division of profits, because there would be one profit fund only. There would not be two profit funds to be ascertained for different purposes. There would be one profit fund, and nobody would have any interest in anything until E that profit fund was ascertained and fell to be divided. But, in the present case, that is not the fact. In the present case, there are two funds of so-called profits which come into the matter. The first one is the fund which has to be ascertained for the purpose of calculating the 20 per cent. In that fund as such the persons entitled to the profits of F this company—namely, the shareholders—have no concern. It is used for the purpose, and for the purpose only, of ascertaining what is to be paid to the Skoda Works and to the corporation. Now, when that amount has been ascertained, that fund has ceased to have any usefulness at all, and it then becomes necessary to ascertain what are the divisible G profits, and, for that purpose, to take another account. The account that is taken then would be an account which not only would bring in depreciation (or, as they did here, would bring out a figure expressed to be subject to depreciation), but would also take into account the sum that had been paid out to the Skoda Works and the corporation upon H the taking of the first account. It seems to me that the circumstance that those two accounts have to be made out throws a very clear light upon the real nature of this transaction, and, looking at the clause in question as a whole, it seems to me clear beyond any reasonable doubt that the agreement is merely an agreement under which, before ascertaining the divisible profits of this company at all, the Skoda Works and the corporation are to receive upon a particular conventional basis a commission sum as remuneration for their services. When that has been said, it appears to me that it brings the case within a very familiar category.

Various authorities have been referred to. Speaking for myself, I find the greatest assistance in a passage in the judgment of ROMER, L.J., in this court in the case of *Adamson* v. *Union Cold Storage Co., Ltd.* (2). ROMER, L.J., says that, in order to succeed in that case, the Crown would have had to establish the following proposition:

> That where a company, for the purpose of enabling it to carry on its trade and earn profits in its trade, places itself under an obligation to make money payments, the amount of which is dependent upon the profits earned, or the payment of which is contingent upon certain profits being earned, payments made in discharge of that obligation are payments made out of the profits or gains of the company, within the meaning of r. 3 (1). In my opinion, for that proposition there is no foundation at all in principle or on authority.

The case that was being dealt with there was a case where the obligation to make the payment was dependent upon the profits earned, but it seems to me that the reasoning and the expressions of ROMER, L.J., apply equally to the case where the payment to be made is a commission or a percentage of profits earned.

The other passage in which I find assistance is a passage in the judgment of the Privy Council delivered by LORD MAUGHAM in *Indian Radio and Cable Communications Co., Ltd.* v. *Income Tax Commissioner, Bombay Presidency and Aden* (3). That was a case into the facts of which I need not go, but it is important as containing a reference to the particular phrase in an earlier case which affected the mind of FINLAY, J., in the present case. That case having been brought to the attention of the Board in the *Indian Radio* case (3), LORD MAUGHAM said, at pp. 713, 714:

> It may be admitted that, as Mr. Latter contended, it is not universally true to say that a payment, the making of which is conditional on profits being earned, cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception is that of a payment to a director or a manager of a commission on the profits of a company. It may, however, be worth pointing out that an apparent difficulty here is really caused by using the word "profits" in more than one sense. If a company, having made an apparent net profit of £10,000, has then to pay £1,000 to directors or managers as the contractual recompense for their services during the year, it is plain that the real net profit is only £9,000. A contract to pay a commission at 10 per cent. on the net profits of the year must necessarily be held to mean on the net profits before the deduction of the commission, that is, in the case supposed, a commission on the £10,000.

That passage, in my opinion, contains sufficient to dispose of this case and, if I may link it up, as I understand it, with what I said a moment ago about the two accounts, the two accounts are what may be called the accountancy aspect of the two different senses in which the word "profits" is used in these cases, as explained by LORD MAUGHAM. Once one realises that, as a matter of construction, the word "profits" may be used in one sense for one purpose and in another sense for another purpose, I think that you have the real solution of the difficulties that have arisen in this case.

The passage relied upon by FINLAY, J., which, against his own opinion, constrained him to decide as he did, was a passage in the judgment of the Privy Council delivered by LORD MACMILLAN in *Pondicherry Railway Co., Ltd.* v. *Income Tax Comrs.* (4). The exact expression in the judgment was this :

A
> A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point, and the revenue is not concerned with the subsequent application of the profits.

It is to be observed that LORD MACMILLAN in that paragraph was quite B clearly using the word "profits" in one sense, and in one sense only. He was using it in the sense of the "real net profit" to which LORD MAUGHAM referred. That he was doing that is, I think, abundantly clear when one considers the nature of the contract there in question, which was merely a contract under which a percentage of profits was C payable by the railway company to the French government. There was no question of services, or anything of that kind, in the case. It was merely a sum payable out of profits. I do not find myself constrained by that expression of opinion, because it must be read, as LORD MACMILLAN has said, in a subsequent case in relation to the particular subject-matter D with which he was dealing.

The decision which I have given, with which the other members of the court will, I understand, agree when they come to deliver their judgments, covers the whole matter. There is no necessity to go on and deliver judgment on the second point. Of course, it will not be taken E from that by anybody concerned that it means that we are necessarily in agreement with the decision of the court below.

ROMER, L.J. : It will be observed by those interested in such matters that Mr. King was not called upon to reply upon that question. They F will be able to form their own opinion, therefore, as to the views of this court, without hearing the reasons why those views have been formed.

I agree with the judgment that has been delivered by SIR WILFRID GREENE, M.R., upon the first point. It appears to me that, in all cases similar to the one with which we are dealing to-day, the real question is : G Is the payment that has to be made by the trader under the contract in question in truth a mere division of profits with another party, or is it in truth a payment to the other party, the amount of which is ascertained by reference to the profits ? Whether the particular case falls on one side of the line or the other is very often a question of extreme difficulty. H How difficult it may be is apparent from the fact that in *Last* v. *London Assurance Corpn.* (1) four judges were of opinion that the payment there fell on one side of the line, and four judges were of opinion that it fell on the other. For myself, in this case I can feel no doubt. The payment that has to be made in this case is, in my opinion, a payment that is made, the amount of which has to be ascertained by reference to certain profits of the company, ascertained in a particular way. The payment is a payment necessary for the purpose of enabling the company or the trader to earn the profits of its trade, and, therefore, it is a legitimate deduction from its profits, when ascertained, for the purpose of assessment under Sched. D. I think that the conclusion is very much assisted by the consideration to which SIR WILFRID GREENE, M.R., has called attention, that in this case the payment is by reference to profits which are not the profits which would be divisible between the company and anybody else interested in those profits. I agree, therefore, that this appeal should be allowed.

MACKINNON, L.J.: I agree. The rule says that, in assessing the annual profits or gains, no deduction shall be allowed or made for any annual payment—not for any annual payment *simpliciter*, but for any annual payment payable out of the profits or gains. The whole question in this case, as in other cases, is whether this, which is an annual payment, is an annual payment to be taken into account in order to ascertain the profits, or an annual payment payable out of the profits after they have been ascertained. I think that the true facts of this case are that it is of the former character. The difficulty in the case arises largely because of the necessary ambiguity in the word "profits," and the fact that in this agreement "profits" as a word does appear; but "profits" quite clearly, as I think, of a different description from the annual profits or gains with which one is concerned in assessing the income tax. That ambiguity again arises and causes a difficulty in that passage that was quoted from the judgment of LORD MACMILLAN in the Privy Council.

> A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits.

"Profits" there means a certain thing, and that is a truism; but it would be equally a truism to enunciate in this sentence: "A payment necessarily made in order to earn profits cannot properly be described as a payment out of profits." Both sentences are ambiguous until one clearly ascertains in what sense one is using the word "profits," and to what it is referable. In this case, I think that this annual payment was not an annual payment payable out of profits after they had been ascertained, but an annual payment to be taken into account in ascertaining what the annual profits were.

Appeal allowed, with costs.

Solicitors: *Godden, Holme & Ward* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

McCRONE *v.* RIDING.

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 13, 1938.**]

Street Traffic—Driving a private motor vehicle without due care and attention—Inexperience and lack of skill of driver no answer to charge—Road Traffic Act, 1930 (*c.* 43), *s.* 12.

The respondent was charged with driving a private motor vehicle without due care and attention contrary to the Road Traffic Act, 1930, s. 12. The justices dismissed the charge, on the ground that the respondent "was exercising all the skill and attention to be expected from a person with his short experience":—

Held: the justices were wrong in assuming that there can be one standard for an ordinary driver and another standard for a person of inexperience or lacking in skill. Whether experienced or inexperienced, a driver must exercise "due care and attention" as provided by sect. 12 of the Act of 1930.

[**EDITORIAL NOTE.** It was attempted to contend by way of defence against the charge of driving without due care and attention that the driver had exercised all that skill and attention which could be expected from a person who had had so little experience of driving as the defendant had had. The requirements of the statute, however, are irrespective of the experience of the driver, and one standard must be applied to both experienced and inexperienced drivers, since the matter is governed by the essential needs of the public on the highway. It will be noted that the requirement of the statute is that the driver shall drive with due "care and attention," and not with due "skill."

As to Careless Driving, see HALSBURY, Supp., Street and Aerial Traffic, para. 683; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 222a-222e.]

Appeal by way of case stated against a decision of the justices for the county of Lancaster sitting at Prescot. The facts are set out in the judgment of Lord Hewart, L.C.J.

The Road Traffic Act, 1930, s. 12 (1), is as follows:

> If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road he shall be guilty of an offence.

Ralph Etherton for the appellant.

The respondent was not represented.

Lord Hewart, L.C.J.: This is a case stated by the justices for the county of Lancaster sitting at Prescot. It arises out of an information preferred against the respondent for that he on a certain day in April last:

> unlawfully acted in contravention of the Road Traffic Act, 1930, s. 12, in that he drove a private motor vehicle without due care and attention.

The justices, having heard the evidence, dismissed the information. The question for this court is whether, in so doing, they came to a correct determination or decision in point of law.

The words of the section are clearly set out in the paragraph of the case which summarises the information, but, after that point was reached, the justices appeared to have directed their minds to a different topic. Apparently, for some reason, whether due to a mood of benevolence towards a learner or not, the justices seem to have preferred to discuss the word " skill " rather than the words " care and attention." They have found that on the day named the respondent :

> after rounding an acute left-hand bend on his proper and left-hand side of the road, drove against and knocked down one of two pedestrians, who were on the left-hand or wall side of the said road, there being no pavement or footway [on that side of the road].

They found that the road was about 23 ft. wide, with a footpath on one side only, and that there was no other traffic on the road at the time. Then they say that they find as a fact :

> that the accident was due to the inexperience and lack of skill of the respondent who became confused and failed to steer so as to avoid the pedestrian or slacken speed in time or to stop.

Then they go on to say :

> that the respondent was exercising all the skill and attention to be expected from a person with his short experience.

All those findings seem to me to make it quite plain that the justices have misconstrued this section. There is nothing in this section about due experience or suitable skill. The words of the section are that it is an offence when a person drives a motor vehicle

> without due care and attention or without reasonable consideration for other persons using the road.

That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver. I think that it is made quite plain that the justices held the notion that two standards could be entertained, because they say in their findings ultimately that they were of opinion that, " had the respondent been an ordinary driver, we would have convicted him on the information." They add, however :

> Though he failed to display such skill as would be expected from an ordinary driver under the circumstances and drove into the said pedestrian, such failure being due to his inexperience and lack of skill did not constitute such want of care and attention [as amounted to an offence].

I think, therefore, that the proper course is that the appeal should be allowed, and that the case should go back to the justices with the direction that regard must be had to the words of this statute " without due care and attention," and that it is wrong to assume that the word " skill " is synonymous with the word " care," and that it is wrong to assume that there can be one standard for an ordinary driver and another standard for somebody else. The question is not a question dependent upon inexperience or lack of skill. It is a question dependent upon lack of care and attention. I think that it is not without significance that the statute uses both the word " care " and the word " attention."

In other words, the driver, whoever he may be, experienced or inexperienced, must see what he is about. He must pay attention to the thing he is doing, and, perceiving that which he is doing or entering upon, he must do his best, and he must show proper care in the doing of that thing upon which he is intent. It may very well be that the error which these justices have made was an error due to a kind of benevolence, but it is very important, I think, that it should be understood that there are not two standards, but that there is one standard only. " Due care and attention " is something not related to the proficiency of the driver, but governed by the essential needs of the public on the highway.

BRANSON, J. : I agree, and I have nothing to add.

HUMPHREYS, J. : I agree.

Appeal allowed.

Solicitors : *Norton, Rose, Greenwell & Co.* (for the appellant).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

CHAJUTIN *v.* WHITEHEAD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 12, 1938.**]

Aliens—Charge of being in possession of altered passport—Whether mens rea must be proved—Aliens Order, 1920, *art.* 18 (4) (*d*).

An alien was charged with having in his possession, without lawful authority, an altered passport contrary to the Aliens Order, 1920, art. 18 (4) (*d*). On conviction, he appealed to quarter sessions, by which court the appeal was allowed, on the ground that the prosecution had failed to prove affirmatively that the alien was in possession of the passport with guilty knowledge that it had been altered :—

HELD : (i) it was not an essential ingredient in the offence that there should be *mens rea* in the person charged.

(ii) once it was established that a person was in possession of a forged or altered passport, it was not open to him to show that he was otherwise acting innocently.

[**EDITORIAL NOTE.** The decision here turns upon the use of the word " knowingly " in some articles of the Aliens Order, 1920, and not in others. The subparagraph dealing with the offence of being in possession of an altered passport omits the word " knowingly," and therefore *mens rea* is not an essential ingredient of the offence.

AS TO *Mens Rea,* see HALSBURY, Hailsham Edn., Vol. 9, pp. 10-12, para. 3 ; and FOR CASES, see DIGEST, Vol. 14, pp. 31-38, Nos. 31-82.]

APPEAL by way of case stated from a decision of the appeal committee of the County of London Quarter Sessions. The facts and the Aliens Order, 1920, art. 18 (4) (*d*), are set out in the judgment of LORD HEWART, L.C.J.

St. John Hutchinson, K.C., and *Christmas Humphreys* for the defendant.

Vernon Gattie for the Metropolitan Police.

LORD HEWART, L.C.J.: This case arose in the following way: On Feb. 15, 1937, the defendant was convicted at the Bow Street Police Court for that on Jan. 25, 1937, in relation to a detective inspector, a person lawfully acting in the execution of the provisions of the Aliens Order, 1920, he had in his possession, without lawful authority, a certain altered passport, contrary to the Aliens Order, 1920, art. 18 (4) (*d*). The defendant thereupon was sentenced to pay a fine of £40 and to pay the sum of £5 5*s*. for costs, and it was recommended that a deportation order should be made in his case. Afterwards the defendant appealed to quarter sessions against conviction, on the ground, we are told, that the conviction was against the weight of evidence, and that he was not guilty of the offence.

The appeal coming on before the appeal committee, it was proved or admitted that the defendant was, on the day referred to in the conviction, in possession of a passport which purported to have been issued to him at Budapest on Oct. 29, 1936, and that that passport had in fact been altered. By common consent, a question of what was said to be a preliminary nature was then argued before the appeal committee—namely, the question whether it was an essential ingredient in the offence that there should be in the appropriate sense *mens rea* in the person charged. It was contended on behalf of the defendant that, in order to constitute the offence contained in this paragraph of this article, it was necessary that the prosecution should establish *mens rea* on the part of the defendant, and that he could not be convicted of the offence charged unless the court were satisfied that he knew, or should have known, that the passport in question was an altered passport. On the part of the inspector, the contrary was contended, and it was contended that, *inter alia*, the mere fact that the defendant was in possession of the altered passport without lawful authority was sufficient to establish an offence within this article.

That question having been raised, the committee came to a conclusion upon it, and the conclusion is expressed in two paragraphs of this concise case:

> The committee found as a fact that the appellant did not know that the said passport had been altered, and honestly believed upon reasonable grounds that it had been issued to him in the ordinary course by the proper authority in Budapest.
>
> We also held that in law it was necessary to establish the offence created by the Aliens Order, 1920, art. 18 (4) (*d*), that the respondent should affirmatively prove that the appellant was in possession of the said passport with guilty knowledge that it had been altered.

The appeal was accordingly allowed, and the question raised by this case is whether that decision was right in law.

It is to be observed that the decision in the terms in which it is expressed is not even sought to be supported by the defendant who is now before us on this appeal. His counsel will not go the length of arguing, or, indeed, of suggesting, that the person who makes the charge must affirmatively prove that the defendant was in possession of the passport with guilty knowledge that it had been altered. Indeed, any such proposition upon the terms of this order is manifestly incapable of being supported. But it is said that in the court below a much more modest proposition of law was put forward, and was in fact accepted, and is referred to in this part of this case in language which goes far beyond its proper dimensions. The proposition is that, although *prima facie* an offence may appear to have been committed when once it is established that a person has in his possession a forged or altered passport, the burden of proof then shifts, and that it is open to the defendant, not merely to show—as the article contemplates that in a proper case he may show—that he had lawful authority for possession of that passport, but also that he was otherwise acting innocently. Now, as soon as that proposition is formulated, it seems to me to become plain that those who support it must in one way or another rewrite the relevant paragraph of this article. The article as it stands—and it is one of a group of provisions relating to offences and penalties—provides as follows:

> (4) Any person shall be guilty of an offence against this order if, in reply or in relation to any immigration officer, inspector, registration officer or other person lawfully acting in the execution of the provisions of this order, he . . . (*e*) without lawful authority uses or has in his possession any forged, altered or irregular certificate, passport or other document or any passport or document on which any visa or indorsement has been altered or forged.

This order from time to time uses, when it intends to use it, the word "knowingly." It uses here the words "without lawful authority," and it is to be observed that the possession which is made an offence is not possession *simpliciter*. It is

> in reply or in relation to any immigration officer, inspector [here an inspector], registration officer or other person lawfully acting in the execution of the provisions of this order.

In my opinion, the order—the history of which is known, and the circumstances giving rise to which are sufficiently familiar—would be reduced almost to waste paper if the offence could not be established, unless the prosecution proved that the person having in his possession the forged passport had guilty knowledge of the fact that it had been forged. It is not quite easy to see how that knowledge, except in rare circumstances, could be directly proved. However, not only, in my opinion, is there nothing in this part of this article to put any such burden upon the prosecution but also the words of the article negative the view that the prosecution is required to carry such a burden.

In my opinion, this drastic order most deliberately in relation to officers and inspectors of the kind named makes it an offence—unless, indeed, there is lawful authority—that a person should even have in his possession a forged passport, and it seems to me to be introducing quite extraneous matter to hold that there is a burden upon the part of the prosecution—to be discharged, I take it, by means of the evidence regarded as a whole—to prove that at the material time the defendant had guilty knowledge of the altering or the forgery. I cannot see any such words in the statute, and the case seems to me to fall within the large and comprehensive classes of cases where, if a person does the act which is prohibited by the statute, that fact imputes to him a sufficient degree of *mens rea* to bring it about that the offence is proved. It is manifest, as indeed counsel for the defendant appears to recognise, that the extreme proposition which the appeal committee have formulated cannot be defended. But the minor proposition seems to me to be also incapable of defence, involving, as it does, reading into this part of the order some such words as "unless the person is acting innocently whereof the proof shall rest upon him," or a proviso at the end of the order, "provided that no person shall be guilty of an offence under this part of this article if it appears that he was not aware of the alteration or forging of the passport." That seems to me to be really rewriting the order. We must take it as it is, and, as it is, I think that the contentions raised on the part of the police in the court below were right, and effect ought to be given to them. Holding that view, I think that this appeal ought to be allowed, and that the case ought to go back to quarter sessions with a direction that the appeal made to that court be dismissed, and that, instead thereof, the conviction appealed against be supported. With regard to the consequential questions of costs, those will be dealt with in the ordinary way by quarter sessions itself, but, so far as this court is concerned, I think that this appeal ought to be allowed with costs.

BRANSON, J.: I agree, and have nothing to add.

HUMPHREYS, J.: I also agree.

Appeal allowed with costs.

Solicitors: *Pritchard, Englefield & Co.* (for the defendant); *Solicitor, Metropolitan Police* (for the prosecution).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ADMIRALTY COMMISSIONERS *v.* VALVERDA (OWNERS).

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Wright, Lord Maugham, Lord Roche), **November 16, 18, 19, 22, December 22, 1937.]**

Shipping—Salvage—His Majesty's ships—Special agreement—Public policy—Merchant Shipping Act, 1894 (c. 60), *s.* 557—*Merchant Shipping (Salvage) Act,* 1916 (c. 41), *s.* 1.

The Valverda was disabled, and certain Admiralty vessels went to her assistance and towed her to port. When the casualty was reported to the owners of the Valverda, they entered voluntarily into a salvage agreement with the Admiralty, no distinction being made among the ships taking part in the salvage, some of which were specially equipped for salvage within the Merchant Shipping (Salvage) Act, 1916, s. 1, while others were not so equipped. The right of the Admiralty to salvage was admitted in respect of the ships specially equipped for salvage, but was disputed in respect of those not so specially equipped. The Admiralty confined its claim to items for the use and services of the vessels, and excluded all items specifically referred to in the Merchant Shipping Act, 1894, s. 557 :—

HELD : (i) the agreement, though it excluded the items specifically mentioned therein, was still subject to the Merchant Shipping Act, 1894, s. 557.

A (ii) the services rendered were salvage services, although the agreement provided for some remuneration in case of non-success.

(iii) the Merchant Shipping Act, 1894, s. 557, upon its true construction, excluded all claims for salvage by the Admiralty.

Decision of Court of Appeal ([1937] 1 All E.R. 49) *affirmed.*

[EDITORIAL NOTE. The House of Lords have here considered, not only the B position of salvage agreements made by the Admiralty, but also the general question whether an agreement containing terms inconsistent with the principle of "no cure, no pay" can, properly speaking, be a salvage agreement. Upon the latter point, their Lordships have upheld the old decisions that remuneration in case of non-success is not inconsistent with the agreement being a salvage agreement. They have also upheld the majority decision of the Court of Appeal that the Merchant C Shipping Act excludes all claims for salvage by the Admiralty, and that the omission of all claims specifically forbidden by the statute does not validate the claim.

AS TO SALVAGE SERVICES BY THE ROYAL FORCES, see HALSBURY, 1st Edn., Vol. 25, Royal Forces, pp. 4, 5, para. 5; and FOR CASES, see DIGEST, Vol. 39, pp. 318-322, Nos. 27-95. The statutes referred to appear in HALSBURY'S COMPLETE STATUTES OF ENGLAND as follows: Merchant Shipping Act, D 1894: 18 Statutes 162; Merchant Shipping (Salvage) Act, 1916: 18 Statutes 585.]

Cases referred to:

(1) *The Rapid* (1838), 3 Hag. Adm. 419; 39 Digest 321, *65*; 8 L.T. 30.
(2) *Griffiths* v. *Dudley* (*Earl*) (1882), 9 Q.B.D. 357; 42 Digest 762, *1875*; 51 L.J.Q.B. 543; 47 L.T. 10.
E (3) *The Kate B. Jones*, [1892] P. 366; 41 Digest 849, *7120*; 69 L.T. 197.
(4) *The Edenmore*, [1893] P. 79; 41 Digest 868, *7392*; 69 L.T. 230.
(5) *Admiralty Comrs.* v. *S.S. Chekiang*, [1926] A.C. 637; 41 Digest 805, *6663*; 95 L.J.P. 119; 135 L.T. 450.
(6) *The Jane* (1831), 2 Hag. Adm. 338; 41 Digest 887, *7732.*
(7) *The Vine* (1825), 2 Hag. Adm. 1; 41 Digest 841, *7035.*
F (8) *The Raikes* (1824), 1 Hag. Adm. 246; 41 Digest 866, *7376.*
(9) *The Thetis* (1833), 3 Hag. Adm. 14; 41 Digest 823, *6817*; 6 L.T. 914; *on appeal* (1834), 2 Knapp, 390.
(10) *The Lustre* (1834), 3 Hag. Adm. 154; Digest Supp.
(11) *The Iodine* (1844), 3 Notes of Cases, 140; 39 Digest 319, *32*; 8 L.T. 30.
(12) *The Mary Pleasants* (1857), Sw. 224; 41 Digest 895, *7868.*
G (13) *The Matti,* [1918] P. 314; 41 Digest 166, *72*; 87 L.J.P. 179.
(14) *The Sarpen,* [1916] P. 306; 41 Digest 846, *7085*; 85 L.J.P. 209; 114 L.T. 1011.
(15) *Elliott Steam Tug Co., Ltd.* v. *Admiralty Comrs., Page* v. *Admiralty Comrs.,* [1921] 1 A.C. 137; 41 Digest 844, *7060*; 89 L.J.K.B. 977; 123 L.T. 754; *affg.* S.C., [1919] 1 K.B. 299, and [1918] 2 K.B. 447.
H (16) *The Morgana,* [1920] P. 442; Digest Supp.; 89 L.J.P. 232; 124 L.T. 254.
(17) *The Five Steel Barges* (1890), 15 P.D. 142; 41 Digest 824, *6821*; 59 L.J.P. 77; 63 L.T. 499.

APPEAL from an order of the Court of Appeal dated Dec. 17, 1936, and reported in [1937] 1 All E.R. 49, reversing by a majority (SLESSER and SCOTT, L.JJ., GREER, L.J., dissenting) the judgment and order of

BRANSON, J., dated Feb. 19, 1936, confirming an award of Sir Norman Raeburn, K.C., stated in the form of a special case for the opinion of the court. The facts and the arguments are set out in the opinions.

The Attorney-General (*Sir Donald Somervell, K.C.*), *G. St. C. Pilcher, K.C.*, and *Owen L. Bateson* for the appellants.

Kenneths Carpmael, K.C., and *H. G. Willmer* for the respondent. A

LORD ATKIN: My Lords, in this case I have had the opportunity of reading the opinion which my noble and learned friend LORD WRIGHT is about to deliver. I entirely agree with it, and I have nothing to add.

B

LORD RUSSELL OF KILLOWEN: My Lords, I have had the same advantage, and I also concur.

LORD WRIGHT: My Lords, the appellants, whom I shall refer to as the Admiralty, obtained from Sir Norman Raeburn, K.C., an award C in their favour of £11,000 for salvage services rendered to the respondents' motor vessel Valverda, her cargo and freight, by vessels belonging to His Majesty. The award was in the form of a special case, subject to the opinion of the court on the question of law stated in it. If the court should answer that question in a sense contrary to the opinion of the D arbitrator, the award was to be for £6,500. BRANSON, J., before whom the special case came, took the same view as did the arbitrator, but his decision was reversed by the Court of Appeal, by a majority composed of SLESSER and SCOTT, L.JJ., GREER, L.J., dissenting.

The central question in the case is the meaning and effect of the E Merchant Shipping Act, 1894, s. 557 (1), which is in the following terms:

> Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, F and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved.

This provision was amended by the Merchant Shipping (Salvage) Act, 1916, which was described in the preamble as:

G

> An Act to authorise the recovery of salvage in respect of services rendered by certain ships belonging to His Majesty.

Sect. 1 of that Act provided as follows:

> 1. Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the H Admiralty shall, notwithstanding anything contained in the Merchant Shipping Act, 1894, s. 557, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty.

The Admiralty's primary contention was that the operation of sect. 557 was excluded and superseded by a salvage agreement entered into between the Admiralty and the respondents. They contended alternatively that the agreement was not for salvage, but for work and labour, and that it took the case out of the law of maritime salvage, so that the section did not apply at all. In the further alternative, they contended that the section did not prohibit all claims for salvage, but excluded certain A specific elements only, leaving the Admiralty entitled to claim in respect of anything not expressly excluded, in particular for the use or services of the vessels. The dispute did not affect the claims in respect of such of the Admiralty vessels employed in the salvage as fell within the Amending Act of 1916, nor the claims of the officers and crews of all B the vessels employed. These claims were not contested, and were covered by the alternative award of £6,500.

The Valverda is a motor vessel of 8,806 tons gross register. At the time of the salvage services, she was on a voyage from Curaçoa to Lands End for orders, with a cargo of petroleum. Ship, cargo and freight were C valued at £92,616 in all. On Jan. 21, 1935, when she was in about Lat. 25° 17′ N., Long. 52° 00′ W., a fire broke out in her engine-room. She sent out an S.O.S. signal by wireless. H.M.S. Frobisher, a cruiser of 9,860 tons displacement, proceeded in answer to the signal, reached her on Jan. 22, 1935, took her in tow, as she was helpless, and towed her D to Bermuda, a distance of about 900 miles. The Guardian, a smaller cruiser, of 3,050 tons, also came up to assist, and rendered some help. At a later stage, salvage services were also rendered by two craft within the description of the Act of 1916, and some assistance was given by a Fleet auxiliary, the Orangeleaf. The arbitrator found that the services E were difficult and dangerous, and involved serious risk to the salving vessels (save the Fleet auxiliary) and their personnel. On Jan. 25, 1935, the respondents in England signed the Admiralty standard form of salvage agreement, which was also signed on behalf of the Admiralty. The parties were by then fully apprised by wireless of the position of F the Valverda and of the names and characters of those of His Majesty's vessels which were rendering the salvage services. The respondents made at the time no suggestion that any distinction should be drawn between the classes of Admiralty vessels which might participate in the services.

G The arbitrator found that the Admiralty incurred expenses, which were reasonable expenses, in rendering the salvage services, amounting to £4,770 19*s.* 2*d.* These expenses consisted of extra consumption of fuel and stores, of the value of gear and wires lost, of the cost of repairing damage sustained, and of other matters in connection with the salving H vessels, which, in addition to the two cruisers and the Orangeleaf, included also H.M.S. Sandboy and the yard craft Creole. Of the £4,770 19*s.* 2*d.*, £864 0*s.* 3*d.* was for repairs to the Sandboy and £264 0*s.* 10*d.* was for extra fuel and stores consumed by the Sandboy and the Creole. The arbitrator found that the Sandboy and the Creole were vessels within the Act of 1916, whereas the Frobisher, the Guardian, and the Orangeleaf were not. It was common ground that the Admiralty in their claim were representing also the claims of the officers and crews of the salving vessels, and were trustees *pro tanto* on their behalf of any award, and would apportion and distribute the appropriate amount among them according to the Admiralty rules in that regard. The necessary permission of the Admiralty for the officers and crews to A claim was produced *de bene esse* to the arbitrator. The question stated by the arbitrator was whether the Admiralty were entitled in law to salvage remuneration in respect of the services of H.M.S. Frobisher, H.M.S. Guardian, and R.F.A. Orangeleaf. He made his award of £11,000 on the footing that they were so entitled. His alternative B award of £6,500 was on the footing that they were not.

The substance of the salvage agreement which was signed may be briefly summarised. It was on the Admiralty standard form of salvage agreement, described on its face as D.46 (a dockyard-form), established Oct., 1917, revised June, 1934. It bears no relation to, and contains C no reference to, sect. 557. It was obviously and admittedly prepared in view of, and for the purposes of, the Act of 1916. Under the agreement, the Admiralty agreed to use such endeavours as they or their officers might in their absolute discretion think fit to salve or assist the ship Valverda and her cargo and freight, and the owners engaged the D services of the Admiralty for such purposes. It was stipulated that the agreement should relate back to the services already rendered before its execution. The remuneration, if not agreed, was to be fixed by arbitration, in accordance with the provisions particularised in the relevant sections of the agreement, and was to consist, if the services were success- E ful or beneficial, of a reasonable amount of salvage. Provision was made for the owners giving security on the termination of the service to the satisfaction of the committee of Lloyd's, and, pending the completion of the security, the Admiralty were to have a maritime lien on the property salved for their remuneration. Clause 5 contained provisions F which were to apply if the services were not successful or beneficial. In that event, the actual out-of-pocket expenses incurred by or on behalf of the Admiralty in the endeavours to salve the ship, cargo and freight, together with compensation not exceeding £350 for any loss or damage incurred in such endeavours, were to be the measure of the remuneration G to the Admiralty, but there was not to be included in the expenses or compensation any charge for the use of any ship or tug belonging to His Majesty.

It was strenuously contended on behalf of the Admiralty that this agreement, which was deliberately entered into by the respondents, with H full knowledge of all the material facts, overrode the provisions of sect. 557. It was pointed out that the beneficial, onerous and expensive services were rendered in consideration of the respondents' undertakings. His Majesty's vessels, even if by statute bound to stand by, were under no legal obligations to render salvage, and might have left the salvage operations to other vessels. It is true that the Admiralty in the King's Regulations have strongly inculcated on the officers and crews of His Majesty's ships that it is their duty to render assistance to vessels in distress, but that is a moral obligation, and gives no legal rights to a shipowner, whereas the agreement did give legal rights to the respondents, but in consideration only of the corresponding legal rights given to the Admiralty. It was urged that the respondents had "contracted out" of the statute, or had waived its benefit, and that the agreement was enforceable according to its apparent tenor, in the events which happened. As the services had been successful and beneficial, the Admiralty, it was urged, were entitled to a reasonable amount of salvage, as if they were private salvors, free from any prohibition or limitation under sect. 557. No distinction could be, or was, drawn between the cruisers and the tug. All the salving vessels were to have the same rights and remedies as if they did not belong to His Majesty. Such were the submissions which found favour with the arbitrator, with Branson, J., and with Greer, L.J. But, with all the deference due to such eminent authorities, I cannot agree with their conclusion. Such a conclusion would, in addition to the reasons I shall next state, afford a simple and easy way of evading or nullifying sect. 557, and would make it a matter of wonder why the Act of 1916 was necessary. A binding salvage agreement may be entered into (subject, no doubt, to a certain jurisdiction over it vested in the Court of Admiralty) without the formality of any writing or standard form. Thus, it may be made by word of mouth between the commander of the King's ship and the master of the ship in distress at the very time and place of the salvage service. The operation of the statute might thus be excluded in every case. But the section is, in my judgment, clearly in its terms imperative and prohibitory, "No claim shall be allowed." It falls into two parts, both equally imperative, the first portion, which is general, and the second, which applies only to claims by the commander or crew, and requires for such claims the consent of the Admiralty. Both equally, in my opinion, are provisions dictated by public policy, and are imposed, not for the benefit of any individuals or body of individuals, but for considerations of State. The latter provision was apparently inserted to prevent improper claims by officers and crews, such as that which in 1838 invoked the censure of the court in *The Rapid* (1). That provision could not, in my opinion, be the subject of contracting out or waiver. The object and policy of the former provision are more difficult to define with any certainty, as will be discussed later. But it is clearly based on public considerations. Wherever there is a question of whether there can be contracting out or waiver of statutory provisions, the problem must be solved on a consideration of the scope and policy of the particular statute. Little help can in general be derived from other statutes. Thus, statutes which deal with procedural or evidential requirements, such as the Statute of Frauds, or the Public Authorities Protection Act, 1893, may in some cases be the subject of waiver, though even in Acts of that character considerations of the purpose of the particular statute may exclude waiver or contracting out. But such Acts are far removed from an imperative public enactment such as sect. 557, which governs the position of a state department and state servants. The case of *Griffiths* v. *Dudley* (*Earl*) (2) was relied on as a case in which a court held that contracting A out of a statute was legitimate and valid. I confess to some doubts as to whether the case was well-decided, but it is not necessary to discuss that further here, because it was a case very unlike the present. The Act in question there, the Employers' Liability Act, 1880, was obviously passed for the benefit of workmen. I am not concerned to say that B the benefit of a statute may not be contracted out of nor waived in appropriate cases. All I need to say is that this, in my opinion, is not such a case.

But I do not think that the agreement, on its true construction, involves the question. The agreement does not in terms purport to C exclude or waive sect. 557. I see no reason why any such intention should be implied. What is to be given as remuneration, in the event of success or benefit, is to be a reasonable amount of salvage. That imports, in my opinion, that the remuneration is to be ascertained in accordance with the principles which are applied in fixing salvage rewards D according to maritime law. That the services were to be treated as salvage services is, I think, also clear from the stipulation for a maritime lien. A maritime lien cannot be created by contract. In my opinion, this agreement must be construed as governed by the relevant rules of maritime salvage. In the particular case of salvage by His Majesty's E ships, one rule which is applicable is that embodied in sect. 557. I venture to quote in this context a sentence from the admirable judgment of SCOTT, L.J., at p. 64, to which I have been much indebted :

> What is there, then, in the language of the agreement, to justify our interpreting it as intended to enlarge the Admiralty's rights, either on their own behalf, or on F behalf of officers and men, beyond the limits allowed by law, so as to give them a remuneration to which, without an agreement, they would have no right ?

I agree with his conclusion that all that the agreement stipulates for is such salvage remuneration as is " not barred by the conjoint operation of the two Acts of 1894 and 1916, and no more." I think that no G question of contracting out or waiver arises in fact, or could in law arise.

This renders it necessary now to deal with the alternative contentic. This is directly inconsistent with the first contention, which I have rejected. The alternative contention is that sect. 557 does not apply at all to this case, because the services were not salvage services under H the maritime law, but were rendered under the agreement, which was not a salvage agreement, but an agreement for work and labour. I have already sufficiently indicated a view that the agreement was an agreement for salvage, and that the services were salvage services, within sect. 557. The provisions for remuneration as salvage and for a maritime lien would be sufficient in themselves to establish this. Salvage must be voluntary, in the sense that it is not rendered under a pre-existing obligation, but it is not deprived of the character of voluntariness merely because the salvor has made an agreement regulating (subject always to the jurisdiction of the Admiralty Court) the conditions under which A he renders the salvage services. I have, however, to note one objection particularly relied on by the Admiralty. The objection is based on cl. 5 of the agreement, which clause provides for a remuneration in the event of non-success. It is said to be inconsistent with the nature of salvage, which is necessarily on a " no cure, no pay " basis. Its presence, B it is said, determines the character of the whole agreement, and prevents it from being regarded as an agreement for salvage. This argument is, in my opinion, not only unsound in principle, but also contrary to well-established decisions of the Admiralty Court. It was boldly contended that these decisions were wrong, in particular *The Kate B. Jones* (3) and C *The Edenmore* (4). In the former case, GORELL BARNES, J., was of opinion that the salvor would be entitled to some remuneration, even in the event of failure, because he was in some respects an agent of the owner of the salved vessel, and, accordingly, he based his award on the principle that the risk of the entire loss of the salvor's expenditure, if unsuccessful, D was a risk which the salvor there did not incur. But that did not lead the judge to treat the services as other than salvage services, though it did affect the amount of the salvage remuneration which was awarded. Similarly, in *The Edenmore* (4) the same judge was inclined to the view that the agreement would entitle the salvors to some remuneration, E even if the services were not successful. But he held that the services were salvage services, and made a salvage award, adding that it was very difficult to say what precise effect such a stipulation ought to have in reduction of the sum awarded when the services proved successful. I think that the principles accepted by that very learned and experienced F judge are sound. The stipulation for some payment in the event of failure is severable. It could not affect the position if the services were successful, save that it might properly be taken into account so as to reduce the amount of the award, on the ground that the salvor was not taking the full risk of " no cure, no pay." In my judgment, the services G rendered to the Valverda by the Admiralty vessels were salvage services, and the agreement was a salvage agreement, so that sect. 557 applied, and excluded the appellants' claim.

But, even so, the third point remains to be considered. This is that sect. 557 does not exclude all claims for salvage, but only the specific H claims enumerated in the section, and that there are other claims beyond these, or at least one important claim—namely, for the use or services of the King's ship as a salving instrument. It is conceded that a King's ship is not a profit-earning vessel. But, all the same, it is said, she may properly be taken to have a value to the Admiralty, reducible to terms of money, so that they can claim in respect of that value during the period in which the ship was occupied on, and appropriated to, the salvage service. The case, it was contended, was, if not identical with, at least similar to, the case where damages are awarded to the Admiralty for loss of time consequent on damage to a King's ship sustained in a collision due to the negligence of the defendants' servants. Such a case was discussed in the *Admiralty Commissioners* v. *S.S. Chekiang* (5), where Lord Sumner, while admitting that such damages were claimable, pointed out the difficulties of estimating them. Sometimes, he said at p. 648 :

> the value of the user may really be no more than that of floating accommodation for officers and crew, who have among other things to be kept under discipline and busy.

On that view, it may be said that, so far as user of the vessels is concerned, the Admiralty in this case may have suffered no loss, or no appreciable loss, so that this element might not affect the amount awarded. But the amount awarded is a matter for the arbitrator, if he acts on correct principles, and the Admiralty relied on the actual language of sect. 557, which did not in terms, they said, prohibit all salvage claims by a King's ship, nor in terms exclude a claim for use of the ship, though it excluded claims for use of stores, and claims for loss, damage or risk to the ship or her stores. They contended that damage or risk to the ship might be regarded as an element in salvage distinct in principle from user of the ship, and that the omission of any express reference to the use of the ship was not made good by the general words "any other expense or loss," because these words referred to recoupment, whereas payment for use of the ship is a subject-matter of reward, nor could such general words make up for the significant omission of reference to the use of the ship. While it is true that the language of sect. 557, merely on the literal meaning of the actual words, is not free from difficulty, I think that, when the practical effect of the section is looked at, its intention is clear, and that it is to exclude all claims for salvage by a King's ship. The enumeration of items or elements, coupled with the general words, was meant to be exhaustive. In fact, the use of the ship was not regarded as a separate element of claim. If items of loss and expense, out-of-pockets, consumption of stores, actual risk, and so forth, were excluded, *a fortiori* must the same be true of any reward for user. User is in truth a difficult idea when applied to non-profit-earning vessels, which, like the cruisers, are dedicated to public service, and for which the Admiralty are trustees for the nation, which is interested in salvage being rendered to the vessels in distress. To modern ideas, this is not perhaps so obvious as it seems to have been in 1853. It is difficult now to see any decisive reason why the general body of taxpayers, rather than the particular shipowners or underwriters who have benefited by it, should bear the expense of salvage. The case is even less obvious when the ships salved are foreign or the underwriters are foreign in whole or in part. But, so far as has been

ascertained, until this case no one has contended that sect. 557 left it
open to the Admiralty to make any claim of any kind whatever for
salvage services rendered by their ships. It has been consistently
accepted by the Admiralty that they are barred from any claim for
salvage, subject to the limited exception introduced by the Act of 1916.
A If the actual words of sect. 557 were regarded as leaving the matter in
doubt, the long sequence of authority (or rather of want of authority,
because the Admiralty never claimed the right to claim) might well be
regarded as decisive. But there is another matter to be considered.
The construction of a statute like this cannot properly be determined
B without ascertaining the state of the law at the time when the section
was originally enacted, in 1853. This, I think, makes it clear that
sect. 557 was intended to exclude all claims for salvage by the Admiralty,
and requires that it should be so construed.

The world has become accustomed to heavy claims and awards for
C salvage being made to shipowners in respect of their vessels, which are
regarded as agents or instruments of the salvage. If it were not for the
powerful steam vessels or motor vessels of modern days, with their elaborate
and valuable machinery and equipment, salvage such as the towage of
the Valverda could not be achieved. The personal courage and exertions
D of the salving officers and crew would be of little avail without the aid
of the mechanical means and the power supplied by the salving vessel.
But this is a modern idea, due to modern conditions, which did not
exist when the Merchant Shipping Act, 1853, s. 39, was enacted. That
section was re-enacted by the Merchant Shipping Act, 1854, s. 484,
E which again was re-enacted by sect. 557 of the consolidating Act of 1894.
As the language of the three sections is substantially the same, it is
essential to observe what the law was in 1853, because it was in view of
that state of law that sect. 39 was passed. At that time, it is, I think,
clear from the cases that the original idea that salvage was personal still
F retained its force, but was in process of being weakened by the growing
sense that private shipowners should, in certain cases, be given for the
services of their steam vessels remuneration which went beyond the
awards in respect of demurrage or repairs, actual expenses and perhaps
risk, which constituted the limit of what was generally given them in
G those days. Even in 1831, in *The Jane* (6), the court observed that the
claim of owners was generally very slight unless their property became
exposed to danger or they incurred real loss and inconvenience. The
award of £700 given in that case was to cover demurrage, repairs, risks
and all expenses. A little earlier, in *The Vine* (7), it had been laid down
H that the general rule was that parties not actually occupied in the salvage
services were not entitled to salvage, but an exception was made in favour
of owners of vessels which, in rendering assistance, had experienced
special mischief and loss. But a special exception had already begun
to be made in the case of steamships. A very early instance is *The
Raikes* (8), in 1824. The reason was explained to be because of their

greater power and efficiency. But this practice was not extended to claims in respect of King's ships, whether steam vessels or sailing vessels. It was well-recognised that the officers and crew were entitled to claim, but I know of no case before 1853, except *The Thetis* (9), decided in 1833, where the Admiralty claimed or were awarded even expenses. This was an exceptional case, in which naval crews, with the help of naval vessels, salved sunken dollars to the value of £157,000. The Admiralty were awarded £12,000, to cover the pay of the men during the 18 months in which they were employed on the salvage, and to cover also victualling, wear and tear of ships, and all expenses during their prolonged operations. Nothing was claimed or awarded for the user of the vessels. Sir Christopher Robinson said that the case was different from the assistance afforded in ordinary cases by public vessels, for which theretofore nothing had been charged. But, even in that case, the award was made on the basis of the owners' not objecting. It is to be noted that claims made by naval officers and crews were habitually described as claims by ships of His Majesty, but the Admiralty were not claimants. In *The Lustre* (10), the Admiral at Portsmouth despatched His Majesty's steamer Dee to assist a vessel in distress, on the terms expressly agreed that the owners and underwriters would be responsible for all stores expended or damaged. Sir John Nicholls awarded salvage to the officers and crew, observing that it was a mistake to suppose that the public force was to be employed gratuitously in the service of private individuals, to save them from expense. That was a peculiar case, but the Admiralty did not claim in the suit. The claim was by the officers and crew. The Admiralty were paid, it seems, under the express bargain, which was only for stores expended and damaged. In *The Iodine* (11), in 1844, the claim was by the officers and crew, as usual, and not by the Admiralty. The court observed, with regard to His Majesty's vessels, that the award would be less, the vessels being at the expense of the country. That must have referred to the award to the officers and crew, as they were the claimants. These and other cases seem to me to show clearly that no one dreamt of any claim by the Admiralty for the use of public vessels in salvage, and that claims by the Admiralty for risk, loss or damage were, for all practical purposes, never made. *The Thetis* (9) and *The Lustre* (10) seem to be the exceptions which prove the rule. They may have been noticed as cases tending to introduce a new, and, as it seemed, objectionable, practice, which called for legislative prohibition. Hence sect. 39 of the Act of 1853 took the form it did. It excluded every claim that anyone thought could be made for salvage by a King's ship, and, I have no doubt, was intended to exclude all claims for salvage by the Admiralty, and should, I think, be so construed. Meticulous draftsmanship has at times caused difficulty by making an enumeration, believed to be exhaustive, where a simple universal would have served better.

That is certainly what has been understood in the reported cases and by text writers from the passing of the Act of 1853 until the question was raised in this case. In 1857, in *The Mary Pleasants* (12), His Majesty's vessel Leopard had rendered salvage services. The officers and crew, with the authority of the Admiralty, under the Act of 1854 claimed, and were awarded, salvage for their personal services. DR. LUSHINGTON A added, at p. 225:

> . . . when I say personal services I use that expression in order to distinguish it from other cases, inasmuch as it has been observed by Dr. Twiss, that no claim could be made on account of the assistance given by the vessel herself for any risk or damage which she had incurred.

B DR. LUSHINGTON is plainly negativing any claim whatever by the Admiralty. The Admiralty have sought since then to claim salvage on the ground, not that salvage was claimable in respect of a King's ship, but that the salving vessel was not a King's ship. Such a claim failed in *The Matti* (13), where salvage was rendered by a requisitioned ship. C The Admiralty claimed a salvage award, but their claim was rejected *in toto*, because it was held that the Matti was a King's ship, so that the Admiralty claim failed because of sect. 557, though the claim of officers and crew was allowed. It was not suggested that, though the Admiralty had no general claim for salvage, at least there was a limited claim for D the use of the ship. There are other cases to the same effect which I need not cite. In 1916, in *The Sarpen* (14), it was held that the salving tug was not a King's ship, but SWINFEN EADY, L.J., thus stated the law, at p. 312:

> Where salvage services are rendered by a King's ship, no claim to salvage can be E made in respect of the ship, but the commander and crew may prosecute a claim with the consent of the Admiralty (sect. 557 of the Act of 1894).

It is interesting to compare these words with the words of DR. LUSHINGTON in 1857. PICKFORD, L.J., states the law to the same effect, and so, I think, did BANKES, L.J., though he uses the word "restricting." There F is in fact no exception to the course of authority on this matter.

The same view of the law was, I think, taken by the legislature when they passed the Act of 1916 set out above. That Act clearly presupposes that without it the Admiralty could have no claim at all for salvage. The Act, so far as the special classes of vessels are concerned, gives to G the Admiralty (i) a claim for salvage; (ii) a claim on the same footing as if the vessels were not vessels belonging to His Majesty. The Act was no doubt passed because of the decision in *The Sarpen* (14). The change which it made, when applied to the case of tugs requisitioned under T 99 was pointed out in *Page* v. *Admiralty Commissioners* (15), by LORD H BIRKENHEAD, L.C., at p. 142, in agreement with what had been held in the Court of Appeal in the same case. In *The Morgana* (16), a cable ship was held disentitled to any salvage under sect. 557, as being a King's ship.

The long and unbroken sequence of cases in which the statutory prohibition against the Admiralty claiming any salvage of any kind at all has been assumed, or enforced without the contrary ever being suggested by the Admiralty, and the recognition of the prohibition by the legislature in 1916 would, in my judgment, in any event make it impossible for this House to hold now that the Admiralty have the right to claim anything for salvage for the use of the vessel.

I have given reasons for the view that the true construction of the clause is to exclude all claims whatsoever for salvage by the Admiralty, but, even if I were wrong in this, it would, I think, be too late for this House to set aside the consistent and unbroken authority of the Admiralty Court and the Court of Appeal, and to depart from the established rule and practice, even though the question has not been determined by this House. This House has, no doubt, power to overrule even a long-established course of decisions of the courts, provided it has not itself determined the question. It is impossible to lay down precise rules according to which this power will be exercised, but in general this House will adopt this course only in plain cases, where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law. This is not such a case. The Admiralty, on whom rested the responsibility, for all these years, of correcting the error, if error there was, have abstained until now from attempting to do so. When, in 1916, the government introduced legislation which was based on, but intended to vary, the prevailing view of the law, the departure from the existing rule was of strictly limited extent, and left the main bulk of the rule unaffected. If the law is now to be declared in a different sense, it must be by the legislature.

This point does not seem to have been raised as a substantive question on these proceedings until the appeal came before this House, though it seems to have been adverted to before BRANSON, J. Your Lordships are asked to remit the case to the arbitrator, and to re-open what would, in effect, be a new inquiry. No doubt your Lordships have jurisdiction to remit, but I should not think that it would be a proper case in which to exercise that discretionary jurisdiction. However, I think the point is bad in law. In my judgment, the appeal fails, the order of the Court of Appeal should be affirmed, and the Admiralty should pay and bear the costs of the appeal to this House.

LORD MAUGHAM [read by LORD RUSSELL OF KILLOWEN]: My Lords, the opinion of my noble and learned friend LORD WRIGHT contains an ample statement of the facts, and an elaborate examination of the authorities, both of which I am happy to be able to adopt without qualification. The importance of the case, and the able arguments of counsel, are my excuses for adding some remarks, shortly stating in my own language the reasons which have led me to the same conclusions. Three points of general interest arise on this appeal: (i) Are the provisions of the Merchant Shipping Act, 1894, s. 557 (1), excluded by a contract of the nature of a salvage agreement made between the

Admiralty and the owners of the vessel salved ? (ii) Does an agreement for rendering services to a vessel in distress cease to be an agreement for salvage under the maritime law if there is found in it a provision for some recoupment or remuneration being paid to the salvor if the services turn out to be wholly unsuccessful ? (iii) Does sect. 557 (1), upon its true A construction, exclude claims by the Admiralty to remuneration of any kind for salvage services successfully rendered ?

While adding a few remarks on each of the questions, I desire to make it clear that I entirely agree with the views expressed by LORD WRIGHT.

B My Lords, on the first point it is to be observed that sect. 557 (1) contains without ambiguity two prohibitions. The first prohibits a claim on behalf of the Crown for the enumerated losses and expenses sustained by the Crown in rendering salvage services, and for the risk to which the ship and her contents have been exposed. The second C prohibits claims by the commander or crew unless the consent of the Admiralty to the prosecution of the claim is proved. It seems to be evident that the second prohibition cannot be avoided by a contract between the commander and the master of the ship. No one indeed suggests that that is possible. Why is a different rule as a matter of D implication to be applied to the first prohibition ? This alone seems to me to be a sufficient reason for answering the first question in the negative. But there are other reasons equally decisive. Nothing in the language of the section suggests that a salvage agreement will take the case out of the statute. The section can be explained only on the hypothesis E that the legislature thought that such claims by the Admiralty were not in the public interest. Sects. 557 to 564 are prefaced by the heading "Salvage by Her Majesty's ships." A mere perusal of them tends to show that they are general, and not intended to be excluded by a salvage agreement. If such an exclusion had been intended, it would have F found an appropriate and a suitable place in sect. 562. Finally, it is legitimate to consider the position as it was in 1853, when the relevant part of sect. 557 was first enacted (the Merchant Shipping Act, 1853, s. 39). At that date, there was no such device as that of wireless communication. Is it to be supposed that the framers of the section con-G ceived that the commander of one of Her Majesty's ships was to be at liberty, for the benefit of the Crown, to negotiate with the master of a vessel in grievous distress on the high seas an agreement ousting the section ? If an answer in the affirmative were possible, it would seem to follow that such a commander ought always, in carrying out his duty H to the Crown, to do his best to secure such an agreement. In my opinion, it is clear that the answer must be in the negative, and, if so, it follows that, since the prohibition is absolute in its terms, there can be no ground for implying such a term as is suggested—namely, an exception or qualification in the case where there is an agreement. Unless such a term can be implied, I think that no question of "contracting out" of the section arises at all. We have to deal with an imperative prohibition, binding the Crown in its relation with subjects, and I am unable to understand how it can be right to hold that the prohibition is to cease to have effect if the Admiralty, being in control of the situation, insist on a salvage contract. So to hold would be to make the prohibition futile.

On the second point, it should be noted that the question of the effect of a stipulation that certain expenses or losses incurred by the salvor should be paid for in any event is of a general character, and not confined to the services of the King's ships. If there had been any sound reason behind the argument that such a clause was wholly inconsistent with the nature of salvage, no doubt we should have been bound to give the contention its effect; but the examination of the matter in the opinion of my noble and learned friend Lord Wright seems to me to be a sufficient answer to that contention. I can see no reason for holding that the master or owner of a ship cannot enter into a true salvage agreement—for example, in Lloyd's well-known form—and at the same time enter into another agreement with the salvor that certain definite expenses, which he expects to incur in any event, shall be recouped to him, whether his services are fruitful or not. If this be so, such a clause as cl. 5 in the Admiralty standard form of salvage agreement is clearly severable from the true salvage agreement. For myself, I will add that it would be unfortunate if the contention that an agreement in the Admiralty form (with cl. 5 in it) is not a salvage agreement at all were to prevail. The master of a commercial vessel may well be willing to enter upon a salving enterprise possessing very doubtful prospects of success if he can secure an agreement that a certain expense or loss in which the job will involve his ship will in any event be repaid. It would not be in the true interests of shipping if this were held to be impossible.

The third point has occasioned your Lordships some trouble, and has involved much consideration of the authorities. The difficulty has been caused by the defective form of the first part of sect. 557 (1). On the one hand, the question leaps to the mind, why did not the legislature simply enact that, in the case of services being rendered by any ship belonging to Her Majesty, no claim for salvage services should be made? On the other, one asks oneself why should the Admiralty be deprived of precisely that recoupment which one would have thought reasonable—that is, recoupment in respect of actual expenses and loss incurred by the salving vessel—and yet be left to make some claim for remuneration? Finally, if there is to be some remuneration, how is it to be estimated or assessed if not only all expenses and loss sustained by reason of the services, but also any consideration based on the risk caused to the ship and her stores, tackle, and machinery, are to be excluded? My Lords, I am not sure that wholly satisfactory answers can be given to all these questions, but, on the conclusion of the arguments of counsel, and after reading all the authorities they referred to, it seemed to me reasonably clear that the specific exclusions enumerated in the section were designed to leave nothing upon which a salvage award could properly be founded. The only item or element in the assessment which the words of the material part of the section do not specifically include is the "use" of the salving vessel. The arbitrator concerned would certainly have to omit from A his estimate the whole of the expenses and losses incidental to such use of a ship belonging to the Crown, and also the risk incurred. I do not suppose that he would be unable, on some such lines as those indicated, not without some characteristic sarcasm, by LORD SUMNER in the *Chekiang* case (5), to name a figure for what I may call the barren use—the B skin of the plum, without either the fruit or the kernel. I think, however, that we have to ask ourselves whether in 1853 the words of the section placed such a curious burden on him. When once it is established that before that date no such claim had ever been made in respect of a ship belonging to Her Majesty, and that the awards which had been made C in respect of them were limited to such matters as victualling, wear and tear, and actual losses and expenses, all of which are prohibited since 1853, we are led a long way towards a negative answer. It is, I think, relevant to consider that the owners of sailing ships did not very often render such services, apart from the services of their crews, as to entitle D them to salvage awards. With the coming of steamships, and the increased possibilities of towage, the situation gradually altered. But at first the element in the services of a ship and its owners which was mainly, if not solely, regarded was the element of special loss and expense incurred: see *The Vine* (7) and the very remarkable case of *The Thetis* (9).

E It should be observed that in 1853 steam navigation was still in its infancy. The majority of Her Majesty's ships, and the overwhelming majority of commercial ships, were still sailing vessels. The early paddle-steamers were of small size. In 1853 only three or four line-of-battle ships were propelled by a screw, and they were converted sailing F ships: see CLOWES' HISTORY OF THE ROYAL NAVY, Vol. VI, pp. 196 *et seq.* In view of these facts, it would seem unlikely that the wording of the section, which makes no distinction between steamships and sailing ships, was designed to permit a special allowance for the use of steamships belonging to the Crown, while precluding any claim for (among G other things) the prodigal expenditure of coal which the engines of that day required. This consideration may perhaps serve as an addition to the reasons given by my noble and learned friend LORD WRIGHT, derived from his careful examination of the authorities. Having regard to those reasons, including the amending Act of 1916 and the unbroken chain of H authority in which the statutory prohibition against claims of salvage of any kind by the Admiralty (except under the Act of 1916) has been assumed, it is, in my view, impossible to come to any conclusion except that the section now bars any claim by the Admiralty for salvage by ships which are neither tugs nor specially equipped with salvage plant.

My Lords, this concludes what I have to say on the three main points.

I have nothing to add, on the question of the true construction of the salvage agreement in the Admiralty standard form, to what has been said by my noble and learned friend Lord Wright, nor anything to add to the reasons given in the able and exhaustive judgment of Scott, L.J. I concur in the proposed motion.

A

Lord Roche [read by Lord Russell of Killowen]: My Lords,
had the argument for the appellant in this House rested where it stood
before the arbitrator, and before Branson, J., and the Court of Appeal,
I should have been content to say that I was satisfied with the reasoning
of the majority judgments in the Court of Appeal, most fully developed B
in the lucid and learned judgment of Scott, L.J. But the argument
has assumed a wider range, and I think it right to state shortly my
reasons for agreement with the conclusions set out in the opinion of my
noble and learned friend Lord Wright, which I have had the advantage
of perusing. C

The last point taken in your Lordships' House, and not taken at any
earlier stage in the proceedings, is perhaps logically the first point in
the case. It is that the statutes relevant to be considered do not forbid
claims for salvage by the Admiralty for the services of a ship, but forbid
only the consideration of certain elements which would otherwise fall D
for consideration in the making of a salvage award. It would, I think,
be a sufficient answer to say that the point was taken altogether too
late, and that the award ought not now to be remitted for consideration.
But the point has been fully argued, and it is more satisfactory that it
should be dealt with on its merits. It was urged that the statutes did not E
forbid a claim nor an award which, neglecting the specifically forbidden
elements, took into account the time and the use of a salving vessel,
and the benefit conferred on a salved vessel. This contention is, in my
judgment, unsound, and is plausible only if the history of the matter is
ignored. The law of salvage as administered by the Court of Admiralty F
is a maritime law, derived from ancient and various sources, and developed
and built up by decisions of the court. Various kinds of salvage services
and various classes of salvors have been recognised by the court as
entitled to salvage remuneration. Prior to the year 1853, those responsible for the Navy of this country, and therefore to be regarded as G
interested in the vessels under their charge, were not so recognised, save
that in isolated cases, of which *The Thetis* (9) is certainly one, remuneration was claimed and awarded, in consideration of, or based upon, what
I may call out-of-pocket expenses. Then, in 1853, Parliament stepped
in, and forbade such claims. The prohibition was repeated in the Act H
of 1854 and in the consolidation Act of 1894, and was recognised by the
Act of 1916 as a general prohibition of claims for salvage services. The
language of the Acts may not be very apt to prohibit claims which had
never been thought of or made when the statutes were passed, but it is,
in my opinion, quite sufficient to prevent any court or arbitrator exercising

Admiralty jurisdiction from doing what might have been done before 1853—that is to say, making an award in respect of salvage claims of the Crown, and probably also, in proper circumstances, extending the grounds and basis of such an award by the inclusion of elements not previously taken into consideration. But there is a long and unbroken stream of decisions and dicta treating the statutes of 1853, 1854, 1894 and 1916 as precluding all claims for salvage on behalf of the Crown, save, of course, in so far as certain claims are now authorised by the Act of 1916. I am satisfied that this view of the effect of the statutes is correct. My noble and learned friend Lord Maugham has assigned forcible reasons for holding that the express words of the statute cover the case, but I hold the view that the same result follows by necessary implication. If I may use a familiar illustration, I would say that, if a man, when he received services from the servant of another, were told that he was not even to pay such servant his out-of-pocket expenses incurred in connection with such services, he would know quite well that still less must he remunerate the servant for those services. So here, where a claim for salvage remuneration in respect of out-of-pocket expenses is forbidden, it would, in my judgment, be quite improper for any tribunal to entertain a claim for salvage remuneration in another form.

My Lords, holding this view on a point which goes to the root of the controversy in the present case, I am in no doubt as to the proper answer to the other contentions of the appellants. As to the construction of the agreement, I think that it is an agreement that the Admiralty should receive and the shipowners should pay an amount of salvage to be assessed in accordance with the law as administered by the Court of Admiralty and as regulated by statute. If it stipulated for an assessment on some other basis, ignoring the statutes, as I think it does not, then I think that effect cannot be given to it. The statutes are statutes regulating the public service, and, with all respect to those who have thought otherwise, their provisions seem to me quite inescapable by any process of contracting out or waiver, at the will of either a public officer or a private person.

There remain two other contentions. The first was one which found favour with Greer, L.J., and was much pressed in this House—namely, that the agreement was not an agreement for salvage, and that, inasmuch as there was an agreement for payment, the payment stipulated for was not salvage remuneration. It is true enough that the right to salvage arises independently of, and is not based upon, contract. But it is untrue to say that, where there is a contract as to salvage, it ceases to be salvage. Counsel for the respondents was probably not far from the mark in saying that, in these days of Lloyd's salvage agreements, the larger number of salvages is regulated by agreement. Nevertheless, they do not cease to be salvages, and they are dealt with and paid for in accordance with the maritime law of salvage. The task would be endless to cite the cases in which the Court of Admiralty has administered the law upon this basis and by so doing has negatived the contention now put forward.

There remains the contention that this particular agreement, by reason of its nature, and, in particular, by reason of the presence of cl. 5, is an agreement which was not a salvage agreement, and therefore is free of the rules of salvage law. It is true enough that "no cure, no pay" is of the essence of salvage. A Unless the *res* is saved and a claimant to salvage brings about or contributes to its safety, he is not ordinarily entitled to salvage remuneration in the proper sense. But there is no reason in principle, nor upon any authority, why a person should not be alternatively a salvor entitled to salvage remuneration or a B labourer worthy of some hire. That alternative position may arise by reason of an agreement antecedent to any salvage services, as in the familiar case of a towage agreement: see *The Five Steel Barges* (17). In such a case, salvage remuneration may be earned if the circumstances warrant it, but, if they do not, the towage money will be payable. C Similarly with an agreement made contemporaneously with, or subsequent to, the rendering of services, I see no obstacle in the way of alternative and truly severable stipulations for remuneration on different bases, according as the facts turn out. That is the situation I find here, upon the plain terms of the agreement. D One basis stipulated for is a salvage basis, and its character is not changed because of the presence of a stipulation for some remuneration on another basis if there is no salvage. The true effect of such stipulations in a case of salvage has been dealt with by GORELL BARNES, J., a judge of the highest authority in these matters, in the two cases discussed by my noble and learned friend E LORD WRIGHT, *The Kate B. Jones* (3) and *The Edenmore* (4). In the former case, the argument now presented to your Lordships appears to have been taken, though slightly, but was rejected by the judge, in whose view the only materiality of the alternative stipulations was that the stipulation for some remuneration in case there was no salvage F was a factor tending to diminish the award proper to be made in case salvage was earned. The ground for this view was that the salvor, in such circumstances, never ran the risk of losing all his pains.

My Lords, I prefer this reasoning to the argument for the appellants, and think that this point also fails them. G For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the appellants); *William A. Crump & Son* (for the respondents).

H [*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re TOPHAM, PUBLIC TRUSTEE *v.* TOPHAM.

[CHANCERY DIVISION (Clauson, J.), **December 2, 1937.**]

Charities—Religious purposes—Social club attached to church—Rules giving control of club to members.

The testator in his will directed that, upon the death of his wife, his trustees should then pay the whole of the capital of his estate to a named club. He directed that the club should appoint three trustworthy men, to be approved by the trustee of the will, to receive such capital and to manage the same for the benefit of the club, and that half of the capital sum should be applied in the purchase of new premises for the club, and that the remaining half should be invested to form a permanent yearly income for the maintenance of the club. The club had for its object the religious, moral, intellectual, physical and social improvement of its members, and was closely linked with the parochial activities of an ecclesiastical parish. The incumbent of the parish was the permanent president of the club. The rules did not make the club one for the benefit of the inhabitants generally or a particular class of inhabitants of a particular district :—

HELD : the club was not a charity, and the gift therefore failed.

[**EDITORIAL NOTE.** The club in this case, upon an analysis of its rules by the judge, is held to be primarily a social club, over which the members themselves have substantial control. It was true that it had a particular tendency towards religious, moral, intellectual and physical improvement, but this was not sufficient, in the circumstances, to bring it within the legal definition of a charity.

AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160 ; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to :

(1) *Re Eades, Eades* v. *Eades*, [1920] 2 Ch. 353 ; 8 Digest 297, *740* ; 89 L.J.Ch. 604 ; 123 L.T. 777.

(2) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574 ; 8 Digest 248, *75* ; 40 L.J.Ch. 640 ; 24 L.T. 869.

(3) *Re Mann, Hardy* v. *A.-G.*, [1903] 1 Ch. 232 ; 8 Digest 257, *182* ; 72 L.J.Ch. 150 ; 87 L.T. 734

(4) *Re Clarke, Clarke* v. *Clarke*, [1901] 2 Ch. 110 ; 8 Digest 263, *250* ; 70 L.J.Ch. 631 ; 84 L.T. 811.

(5) *Re Amos, Carrier* v. *Price*, [1891] 3 Ch. 159 ; 8 Digest 325, *1083* ; 60 L.J.Ch. 570 ; 65 L.T. 69.

(6) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531 ; 8 Digest 241, *1* ; 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 3 Tax Cas. 53.

(7) *Re Turkington, Owen* v. *Benson*, [1937] 4 All E.R. 501 ; Digest Supp.

(8) *Re Drummond, Ashworth* v. *Drummond*, [1914] 2 Ch. 90 ; 8 Digest 265, *267* ; 83 L.J.Ch. 817 ; 111 L.T. 156.

(9) *Re Allen, Hargreaves* v. *Taylor*, [1905] 2 Ch. 400 ; 8 Digest 257, *183* ; 74 L.J.Ch. 593 : 93 L.T. 597.

ADJOURNED SUMMONS for the determination of (*inter alia*) the following question : whether, upon the true construction of the testator's will, the trust of the testator's residuary estate for the benefit of the Christ Church Club limited to take effect (in the events which have happened) after the death of the defendant Florence Evelyn Topham (*a*) is valid and effective as a valid charitable trust or otherwise, or (*b*) is void as to the whole or any and what part of the said residuary estate as infringing the rule against perpetuities or otherwise.

D. Ll. Jenkins for the plaintiff, the sole executor of the testator's will.

Raymond Jennings for the first defendant, the widow of the testator.

C. L. Fawell for the second defendant, the legal personal representative of the testator's elder brother.

R. M. Pattisson for the legal personal representatives of the estate of the testator's younger brother.

Fergus D. Morton, K.C., and *C. V. Rawlence* for the four remaining defendants, the trustess of the Christ Church Club, Brighton.

Jennings: The gift to the club is not a charitable gift. The objects stated in its rules are to be read disjunctively, and certain of these objects are not charitable, and, consequently, if the court comes to the conclusion that this is so, that would be a decision that the club was not charitable. If the court came to the conclusion that the club was a charity, it would not be a charity in the legal sense, because the funds are to be devoted to the benefit of the members of the club. The very essence of charity, in the legal sense, is that the charity should benefit the community as a whole or some part of it. This club must not be for the benefit of any particular class, except that the members must be of a certain minimum age. There is no evidence that the members come solely from this particular district, and therefore the gift does not comply with the very essentials of the legal requirements. The trustees are entitled to devote their fund to any purpose which is religious, moral, social, physical or educational. The club is not a charity, because it benefits only its own members. [Counsel referred to *Re Eades, Eades* v. *Eades* (1), *Cocks* v. *Manners* (2), *Re Mann, Hardy* v. *A.-G.* (3).]

Fawell: I should like to put the matter in a slightly different way. Mr. Jennings has suggested that the club has a number of objects. I suggest that it has only one object, and that that object is the improvement of its members. The improvement may have various sides, but it is only one object. Where the object of a society is the improvement of its members, the society is not a charity. This fund, if paid to the club, would be affected by a trust which would prevent the members from dealing with it as they wished. [Counsel referred to *Cocks* v. *Manners* (2), *Re Clarke, Clarke* v. *Clarke* (4), *Re Amos, Carrier* v. *Price* (5).]

Pattisson: It is necessary to ascertain the particular passage in each particular case before the principle can be applied. In the present case, the intention of the testator was to create a fund which would be an endowment for an institution, or club, an indeterminate body of members, and a society which would exist for an indefinite time. No distinction can be made between the two halves of this fund. The club is not an institution which can fall into any of the four classes laid down by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs.* v. *Pemsel* (6).

Morton, K.C.: On the true construction of this gift, there is an absolute gift to the members of the club. The subsequent directions merely express the purpose of the gift, or, alternatively, they impose conditions subsequent, which the court will reject if they infringe the rule against perpetuities. As regards the first moiety of the gift, there is no perpetuity involved. With regard to the first point, the gift is a direction to the trustee to pay the whole of the capital to the Christ Church Club. That club has no separate existence as an entity. It is a direction to pay to the members of the club. So far, it is an out-and-out gift, and the testator directs the club to appoint three trustworthy members of the club to receive the money, and to manage it for the benefit of the club. There is nothing which compels the club to appoint three trustworthy men. It is a gift to the members of the club. The directions could be rendered nugatory the next day, and they are no more than expressions of a purpose. The conditions are no more than conditions subsequent, and the court will reject them if they tend to a perpetuity. Assuming that there is binding force in the direction, the first half, which is to be devoted to acquiring new premises, involves no perpetuity. It is a voluntary association of people who have banded themselves together for a particular purpose. [Counsel referred to *Re Turkington*, *Owen* v. *Benson* (7), *Re Drummond*, *Ashworth* v. *Drummond* (8), *Re Allen*, *Hargreaves* v. *Taylor* (9).]

Rawlence: If the gift had stopped short at the gift to the club, the case would cause less difficulty, but the will goes on to say that the club is to appoint three trustworthy men to manage the fund for the benefit of the club. They would be in substantially the same position as that of the committee in *Re Drummond*, *Ashworth* v. *Drummond* (8).

Clauson, J.: The testator in this case gave his real and personal estate to the Public Trustee upon trust for sale and conversion, and directed him out of the proceeds to pay a legacy to his widow, and to pay her a life annuity. He then gave a direction as to a particular house, of which she was to have the occupation during her life, and then he directed his trustee during the lifetime of his wife to accumulate any balance of income that might remain, after paying the said annuity to his said wife, until the death of his wife, and, upon the death of his wife, he directed his trustee to pay and divide the capital sum to the children of his marriage, and, if there should be no children, which was the event, then he continued by giving the following directions:

> I direct my trustee to pay the whole of the capital then [on the death of his wife] representing my real and personal estate to the Christ Church Club now carried on at No. 26, Bedford Place, Brighton and I direct that the said club shall appoint three trustworthy men to be approved by my trustee to receive the said capital monies and to manage the same for the benefit of the members of the club. I direct that half of the said capital sum be devoted to acquire new premises for the club or in improving and purchasing the existing premises and furnishing the same. I direct that the remaining half of the said capital sum shall be invested to form a permanent yearly income for the maintenance of the club.

I will deal in a moment with what the Christ Church Club is, but I think that, in the first instance, it would be desirable that I should form and express a view as to the meaning, on the face of it, of these directions. As I read it, there is here a peremptory direction for the creation of a trust. It differs from the ordinary mode in which a testator creates a trust, in that he contemplates that the trustees should be persons who A are to be named for the purpose by this body, the Christ Church Club. It appears to me, on the construction of it, reasonably plain that he contemplated the setting up of a trust, the persons to be trustees having been selected by him, to receive the capital sum and to manage the capital sum for the benefit of the club, and to manage it in accordance B with certain quite specific directions. He directs:

> that half of the said capital sum be devoted to acquire new premises for the club or in improving and purchasing the existing premises and furnishing the same [and he directs] that the remaining half of the said capital sum shall be invested to form a permanent yearly income for the maintenance of the club.

C

Those words seem to me to indicate a clear intention in the testator's mind, which he states with reasonable clarity, that a permanent trust should be set up, that one half of the fund should be an endowment fund, in the sense that the income will be available to meet the cost of the club, and that the other half shall be a permanent endowment fund, D in the sense that either new premises or the existing premises shall be acquired, and that they should be a permanent endowment for the club, the club having the benefit of the occupation of the premises.

Now, if my view of the meaning of these ten lines be the correct view, it seems to follow quite plainly that the testator is creating a permanent E trust which is of the character of a perpetuity.

So far, the matter is purely one of construction of this particular will. I have been referred, and I make no complaint about it (I am very much indebted to counsel for drawing my attention to them), to a number of cases more or less close to the present one, but, after con- F sidering all those cases with care, so far as this part of the case is concerned, the matter is reduced to this: What is the fair meaning of the words used by the testator? For myself, I can put on those words no other construction than that which I have stated.

Assuming my view of the construction to be correct, it follows that, G unless the purposes for which this perpetuity is set up are charitable purposes, the gift must fail. I therefore devote myself next to the consideration of the question as to whether the objects of this gift are charitable. That resolves itself into this question: What is the Christ Church Club, and is it or is it not an institution with charitable objects H within the meaning, of course, of the term "charitable" as used in these courts? The club has for its object the religious, moral, intellectual, physical and social improvement of its members. It is closely linked with the parochial activities of a parish or parochial district in Brighton attached to Christ Church. I say that because I observe that the permanent president of the club is to be the incumbent of Christ Church, and, from the evidence before me, it appears that the building in which the club has up to the present time carried on its activities has in fact been used, I suppose at the times of the day when the club was not effectively functioning, for a number of objects obviously closely associated with the parochial activities to which I have referred. Its association with the incumbent of Christ Church and its association with the parish or ecclesiastical district of Christ Church, whilst, of course, interesting, does not itself, however, determine what the character of the club is. That must be determined by studying the rules of the club in the light of the facts. The rules of the club are precisely such as I should expect to find if the club was a club, if I may use the expression, of an ordinary social type, with a particular tendency towards religious, moral, intellectual and physical improvement. But the club seems to be a purely voluntary institution. So far as the rules are concerned it would seem to be a club over which the members have entire control, a club the activities of which are aimed at the personal benefit of the members, and I cannot see my way to distinguish it from any other voluntary social club upon the facts which are in evidence before me. It was rather suggested that I might find some assistance towards coming to a conclusion that it was of a charitable character because I could treat it as being a club aiming at the general improvement and the general benefit of the inhabitants of a particular restricted area—namely, the parish or ecclesiastical district of Christ Church. I cannot find on the face of the rules, and I cannot find in any of the evidence before me, anything which would justify me in regarding this club as having a public or quasi-public character, or as having activities which aim at the benefit of the inhabitants generally, or a particular class of inhabitants of a particular district. The question is one of fact. I was told that there was a case in which it had been considered whether a particular village club was charitable, and, apparently, on the facts of that case, it was held in the case of some village club; I suppose open to all the villagers, either according to its rules or in practice, that it was one which was an institution for the public benefit of inhabitants of a particular area. That there may be such cases I do not doubt, but I cannot find anything in the evidence before me which justifies me in holding that this particlar club is of that character. In other words, I can find no ground for holding that this club is an institution or charity within the usual meaning of that term.

The result is that I feel bound to hold that this gift is ineffectual. I may perhaps be permitted to say—though I do not suppose it is of any consolation to anybody—that I do feel, in coming to that decision, that I am setting at nought the perfectly plain intention of the testator. That, of course, is a matter with which I have nothing to do. His intention seems to have been that of providing an endowment fund in perpetuity for a purely voluntary club, with no charitable characteristic, but that is an object which, at all events, he is not able to carry out by the words he has chosen in making this will.

Solicitors: *Palmer, Bull & Co.*, agents for *F. W. A. Cushman & Son*, Brighton (for the plaintiff and the second defendant); *Walmsley & Stansbury*, agents for *J. E. Dell & Loader*, Brighton (for the first defendant); *Young, Jones & Co.*, agents for *Blaker, Son & Young*, Lewes (for the legal personal representatives of the estate of the testator's younger brother); *Thomas Eggar & Son* (for the trustees of the Christ Church Club).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re COUNTER'S PETITION, BUCKINGHAM *v.* COUNTER.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **January 12, 1938.**]

Elections—Rural district councillors' election—Petition alleging illegal practice—Petition presented one day late owing to bank holiday—Parliamentary Elections Act, 1868 (c. 125), *ss.* 25, 49—*Municipal Corporations Act,* 1882 (c. 50), *ss.* 100 (1), 230—*Municipal Elections (Corrupt and Illegal Practices) Act,* 1884 (c. 70), *s.* 25 (1)—*Local Government Act,* 1933 (c. 51), *ss.* 40 (2), 295—*Municipal Election Petition Rules,* 1883, *r.* 38—*Rural District Councillors Election Rules,* 1934 (*S.R. & O.*, 1934, *No.* 546), *r.* 5 (5).

On Apr. 5, 1937, a rural district election was held. On May 18, 1937, a petition was presented alleging illegal practices at this election. By the Rural District Councillors' Election Rules, 1934, r. 5 (5), such a petition must be presented within six weeks of the election. In this case, the last day of the six weeks was May 17, 1937, which was Whit Monday, on which day the master's office was closed. It was contended by the respondent that in such a case the Municipal Election Petition Rules, 1883, r. 38, applied, and that the petition should have been presented by posting in the letter-box of the master's office, and filing an affidavit on the next day:—

HELD: the Local Government Act, 1933, s. 295 (1), governed the present case, and the petition had been correctly presented. Rule 38 applies only in cases where the master's office is closed upon the last day on which something is required or permitted to be done under the Act. In this case, though the office is closed on Whit Monday, sect. 295 (1) extended the time to Whit Tuesday, and on that day the office was open.

Decision of the Divisional Court (GODDARD and HILBERY, JJ.) *reversed.*

[**EDITORIAL NOTE.** The Divisional Court had treated this matter as governed by the rules made in 1883, but the Court of Appeal have decided that the matter is governed by the 1933 Act, s. 295 (1). The time for presenting the petition had by that section been extended to the day after a public holiday, so that the presentation on that day was in order and did not require to be justified under the provisions of rule 38 of the 1883 rules.

AS TO PRESENTATION OF PETITION, see HALSBURY, Hailsham Edn., Vol. 12, p. 473, para. 920; and FOR CASES, see DIGEST, Vol. 20, pp. 151, 152, Nos. 1273-1275.]

APPEAL from a decision of the Divisional Court (GODDARD and

HILBERY, JJ.), dated Nov. 16, 1937. The facts are fully set out in the judgments.

H. M. Pratt for the appellant.

F. S. Laskey and *R. F. G. Ormrod* for the respondent.

Pratt: It is necessary first to compute what is the last day for pre-
A senting a petition before r. 38 can come into operation. It is submitted that the last day fell on the Tuesday, and that Whit Monday was excluded. By R.S.C., Ord. 63, r. 6, Whit Monday is one of the holidays of the Supreme Court. The election rules admittedly apply, but they come into operation only when the last day is known, and that must be
B found out by computing in accordance with the Local Government Act, 1933, s. 295 (1). If the last day, so found, falls on a legal holiday, then the rules apply. The Act and the rules exist side by side, and there is room for both.

Laskey: It is submitted that sect. 295 (1) does not apply to this case.
C The rules permit something to be done, not on the last day, but on another day. Rule 38 does not seek to alter the method of computation. It is simply a rule to regulate procedure when time falls on certain days. Here the last day fell on Whit Monday. The rule applies, and the petition should have been posted in the letter-box of the master's office.

D

SLESSER, L.J.: In this case, I am of the opinion that the decision of the Divisional Court must be reversed. The only question which falls to be considered is whether the petitioner was or was not out of time in presenting her petition. The facts of the case are not in dispute. There
E had been a rural district election for the parish of South Tawton, Okehampton, Devonshire, and complaint was made that certain false statements had been made, which constituted an illegal practice. The petition was presented a considerable time after the election had been held, and there is no dispute that, were it not for the statute, the last day for its
F presentation would have been May 17, 1937, which day happened to be Whit Monday. This was six weeks after the election, which had been held on Apr. 5, 1937. The time within which a petition may be presented is regulated by the Rural District Councillors' Election Rules, 1934 (S.R. & O., 1934, No. 546), made by the Secretary for State in
G pursuance of the Local Government Act, 1933. Rule 5 of these rules is described as:

> an adaptation of Part IV of the Municipal Corporations Act, 1882, and Municipal Elections (Corrupt and Illegal Practices) Acts, 1884 and 1911.

Rule 5 (5) reads as follows:

H

> Subsect. (1) of sect. 25 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, shall be adapted and altered so as to read as follows: "(1) An election petition complaining of an election on the ground of an illegal practice may be presented at any time within six weeks after the day of election."

As I have said, May 17 was the last day of the six weeks. In fact, the petition was presented on the next day, May 18, and the question which has now received a second consideration on appeal is whether that was an adequate presentation.

The Local Government Act, 1933, provides a method whereby time may be computed. Sect. 295 reads as follows:

> 1. Where the day or the last day on which anything is required or permitted by or in pursuance of this Act to be done is a Sunday, Christmas Day, Good Friday, A bank holiday or a day appointed for public thanksgiving or mourning, the requirement or permission shall be deemed to relate to the first day thereafter which is not one of the days before mentioned.
>
> 2. Where under the foregoing provisions of this section an election is postponed, the day on which the election is held shall be treated as the day of election for all purposes of this Act relating to that election:
>
> Provided that, where a day is declared to be a bank holiday or day of public B thanksgiving or mourning, nothing in this subsection shall affect the validity of any act done in relation to an election before or on the date of the declaration.

The first question is whether the last day on which anything is required or permitted by or in pursuance of this Act to be done is a bank holiday. The last day on which anything is required or permitted by or in pursuance of the Act to be done would be a bank holiday if the Rural District C Councillors' Election Rules, 1934, r. 5 (5), which extended to six weeks the period allowed for the presenting of a petition, referred to something which was permitted to be done by, under, or in pursuance of, the Act of 1933. In my opinion, this was clearly something that was permitted to be done within six weeks. Under the Local Government Act, 1933, D presenting a petition is something which is permitted to be done. Sect. 40 (2) provides:

> At every election regulated by district election rules the poll shall be taken by ballot, and Part IV of the Municipal Corporations Act, 1882, the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (other than the provisions referred to in E sect. 37 of that Act), the Municipal Corporations (Corrupt and Illegal Practices) Act, 1911, and the provisions of the Second Schedule to this Act shall, subject to such adaptations, alterations and exceptions as may be made by the district election rules, apply in like manner as in the case of an election of councillors of a borough.

As I have pointed out, the Rural District Councillors' Election Rules, 1934, were made in pursuance of the Act of 1933 for the conduct of an F election of rural district councillors, and therefore this election was one regulated by the rules, and r. 5 has duly adapted and altered the provisions of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 25 (1), which, apart from this Act, would have provided for a more limited period within which the petition ought to have been G presented.

In these circumstances, it is clear that the Divisional Court was mistaken in holding that the time for presenting the petition was to be computed by reference to the code set out in the 1882 and 1884 Acts. The language of these Acts was altered and modified by the 1933 Act, H and anything given by the Act of 1882 as modified by the 1933 Act was clearly something required or permitted to be done in pursuance of the Act of 1933. Sect. 295 of that Act provided that, where the last day on which something was required to be done was one of the public holidays mentioned, the requirement should be deemed to relate to the first day thereafter. That is, in this case, the day after Whit Monday—namely, Tuesday, May 18. The effect of sect. 295 is to exclude Whit Monday as the last day of the six-weeks' period.

So far the matter presents little difficulty, but an argument was presented to the Divisional Court which apparently had great weight with it. That argument depended upon the rules which were made in 1883 by the judges on the rota by virtue of the Municipal Corporations Act, 1882, s. 100, which reads as follows :

> (1) The judges for the time being on the rota for the trial of parliamentary election petitions may from time to time make, revoke, and alter General Rules for the effectual execution of this Part, and of the intention and object thereof, and the regulation of the practice, procedure, and costs of municipal election petitions, and the trial thereof, and the certifying and reporting thereon.

It is clear that in that Act the regulating of election petitions was not intended to extend to the alteration of times, and the reason is that by sect. 230 special provisions were made to exclude Sunday, Christmas Day, Good Friday, Monday or Tuesday in Easter week, or a day appointed for public fast, humiliation or thanksgiving. In point of fact, the rule made by the judges that was here relied on was dealing with entirely different subject-matter. It was dealing with the problem of what was to be done when the master's office was closed by reason of its being a legal holiday. Rule 38 is as follows :

> When the last day for presenting petitions, or filing lists of votes or objections, under rr. 7, 8, or recognisances, or any other matter, required to be filed within a given time, shall happen to fall on a holiday, the petition or other matter shall be deemed duly filed if put into the letter box at the Master's office at any time during such day ; but an affidavit, stating with reasonable precision the time when such delivery was made, shall be filed on the first day after the expiration of the holidays.

There is no doubt that, by virtue of sect. 40 of the 1933 Act, the rule does apply to district council elections, because no adaptation of the rule was made, but it had nothing to do with the problem to be solved here. The question here is : What is the period of time within which a petition may be presented ? That must have expired on Whit Monday, which is one of the days mentioned in sect. 295 of the Act of 1933, and so must be excluded, and so the last day is Whit Tuesday. Then the problem arises, what is to be done ? On that day the master's office was open : see R.S.C., Ord. 63, r. 6. It is only on the Monday in that week that it is closed, and so in this case there is no difficulty at all. But it might well happen that the last day on which something was required or permitted to be done was a day on which the office was closed owing to a legal holiday other than one of those days mentioned in the statute. Then r. 38 would apply, and the petition would be duly presented by being placed in the letter-box, and an affidavit being filed on the day after the legal holiday. In this case, there is no such difficulty. There is no dichotomy between the Act and the rules.

This distinction between methods of computation is not new. It dates back to 1868, where, in dealing with parliamentary petitions, the Parliamentary Elections Act, 1868, s. 49, provided that, in reckoning time for the purposes of that Act, Sunday, Christmas Day, Good Friday, and any day set apart for a public fast or public thanksgiving, should be excluded. In sect. 25 of the same Act there is a specific power given to the judges to revoke and alter orders for the effectual execution of the Act and for the regulation of election petitions.

So the decision of the Divisional Court was at variance with the whole structure of the statutes as adapted by the Act of 1933 and the rules. For these reasons, this appeal must be allowed, as the petition was presented within the time required by the Act.

Greer, L.J.: I agree, and for the reasons stated, with all of which I agree. Had it not been that we are differing from the Divisional Court, to whose decisions I give the greatest weight, I should not have felt it necessary to add anything. In my judgment, the judges failed to give due weight to the Local Government Act, 1933, s. 295, which expressly deals with the kind of election petitions here considered. Sect. 295 is as follows:

> (1) Where the day or the last day on which anything is required or permitted by or in pursuance of this Act to be done is a Sunday, Christmas Day, Good Friday, bank holiday or a day appointed for public thanksgiving or mourning, the requirement or permission shall be deemed to relate to the first day thereafter which is not one of the days before mentioned.
>
> (2) Where under the foregoing provisions of this section an election is postponed, the day on which the election is held shall be treated as the day of election for all purposes of this Act relating to that election:
>
> Provided that, where a day is declared to be a bank holiday or day of public thanksgiving or mourning, nothing in this subsection shall affect the validity of any act done in relation to an election before or on the date of the declaration.

The Rural District Councillors Election Rules, 1934, r. 5 (5), is as follows:

> Subsect. (1) of sect. 25 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, shall be adapted and altered so as to read as follows:- "(1) An election petition complaining of an election on the ground of an illegal practice may be presented at any time within six weeks after the day of election."

This means "shall be adapted for the purpose of the rural district council elections." This rule provides an amendment or adaptation of sect. 25 of the Act of 1884, extending the period within which a petition is to be presented from fourteen days to six weeks from the day when the election took place. Then, by virtue of sect. 295, one gets one day beyond the six weeks as the day allowed for presenting the petition. In this case, the petition was presented one day after the period of six weeks had elapsed. If that day happened to be a holiday in the courts, then the provisions of r. 38 would take effect as to posting the petition, but they do not apply to this case, as it happened on the day after the holidays had expired. I therefore agree that the appeal should be allowed.

SCOTT, L.J.: I agree with both judgments, and for the reasons given.

Appeal allowed.

Solicitors: *Torr & Co.*, agents for *Eastley & Co.*, Paignton (for the appellant); *Patersons, Snow & Co.*, agents for *Burd, Pearse, Prickman & Brown*, Okehampton (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

ROBINSON *v.* R. C. HAMMETT, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 11, 12, 1938.**]

Food and Drugs—Marks of origin—Imported meat—Mark not visible to purchaser—Merchandise Marks Act, 1926 (*c.* 53), *s.* 5—*Merchandise Marks* (*Imported Goods*) *No.* 7 *Order*, 1934 (*S.R. & O.*, 1934, *No.* 727), *arts.* 2, 3, 4.

The respondents were charged with unlawfully selling to a purchaser imported meat not bearing the prescribed marks of origin. The purchaser in question had asked for, and paid the price of, English steak, but in fact had received Argentine steak. This was cut off from a large rump of beef, upon which indications of Argentine origin were branded underneath, where they were not visible to the purchaser:—

HELD: the Merchandise Marks (Imported Goods) No. 7 Order, 1934, art. 2, requires the indication of origin to be branded durably and conspicuously, and, as the indication was not conspicuously given, the offence here charged was proved.

[**EDITORIAL NOTE.** It is not sufficient compliance with the order here in question that the meat should in fact be branded with a proper mark of origin. It is also necessary that, by reason of the position of the mark or the way the meat is exhibited, the mark can be seen by a purchaser.

AS TO MARKS OF ORIGIN, see HALSBURY, Hailsham Edn., Vol. 15, pp. 190-193, paras. 330-339. FOR THE MERCHANDISE MARKS ACT, 1926, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 19, p. 898.]

APPEAL by way of case stated against a decision of justices for the county of Middlesex. The facts are set out in the judgment of LORD HEWART, L.C.J.

The Merchandise Marks (Imported Goods) No. 7 Order, 1934 (S.R. & O., 1934, No. 727), arts. 2, 3 (1), 4 prov., are as follow:

2. The indication of origin shall be branded, or stamped stencilled or printed in ink or stain, durably and conspicuously, in letters which shall, except where otherwise specifically provided, be not less than one half of one inch in height.

3. The indication of origin required on importation shall be applied as follows, that is to say: (1) in the case of chilled beef, each side of chilled beef shall bear the indication of origin on the outer side in a continuous series of words in three columns extending longitudinally: (i) from the hock joint to the neck, in a line passing over the round, aitchbone and rump and then continuing at a distance of two inches from the chine bone to the neck; and (ii) from the hind leg or shin to the fore-shin in a line drawn down the middle of the side; and (iii) from the fore-rib or crop to the sticking in a line drawn midway between the lines specified in (i) and (ii), as shown in the diagram, Fig. I, in the schedule to this order.

4. . . . Provided that in the case of any joint or cut of chilled beef or frozen mutton or frozen lamb or frozen pork such as is mentioned in para. (1) of this article, and in the case of any boneless beef, boneless veal, salted beef, salted pork,

edible offals, frozen beef or frozen veal the requirements of this article as to the application of the indication of origin on exposure for sale shall be deemed to be complied with: (*a*) where a tray, slab or rail contains either only imported meat of Empire origin, or only imported meat of foreign origin, as the case may be, and a ticket or label bearing the indication of origin is prominently displayed on such tray, slab or rail, clearly visible to intending purchasers and adequately identifying the meat to which it applies. . . .

Provided also that in the case of any portion of meat of the kinds specified in the last foregoing proviso, the provisions of this article as to the application of the indication of origin on sale shall be deemed to be complied with: (*a*) where the indication of origin is clearly and conspicuously stated on an invoice or delivery note attached to or accompanying the meat; (*b*) where a sale of any portion of meat which is duly marked on exposure for sale in accordance with the provisions of this article is made to a purchaser who is present at the time of sale at the shop, place or premises on which such portion of meat is exposed for sale. A

B

The Merchandise Marks Act, 1926, s. 5 (1), states as follows:

If any person (*a*) sells, exposes for sale, or distributes by way of advertisement, any goods in contravention of the provisions of this Act; or (*b*) acts in contravention of or fails to comply with any order in council made under this Act; he shall, subject to the provisions of this section, be guilty of an offence against the principal Act. . . .

C

H. Glyn-Jones for the appellant.

R. Ives for the respondents.

LORD HEWART, L.C.J.: An information was preferred by the present appellant against the respondents for that they did unlawfully sell D to a purchaser imported meat which did not bear the prescribed indication of origin, contrary to the Merchandise Marks (Imported Goods) No. 7 Order, 1934 (S.R. & O., 1934, No. 727), and to the Merchandise Marks Act, 1926, s. 5. That information was heard by three justices for the county of Middlesex, and they dismissed it, subject to this case stated. E

The facts are as simple as could well be. The respondents carry on business as retail butchers in a shop, and, on a day in Apr., 1937, a woman called at that shop and asked one of the respondents' salesmen for a pound of English steak. The salesman took a large rump of beef from the inside of a refrigerator, placed it on a bench, which bench F could be seen by the purchaser, and, in her presence, cut off a pound of steak. He sold her that pound of steak for 2*s*. 2*d*., and that, the case finds, is the usual price for English steak; it is more than the usual price of Argentine steak. The meat was in fact Argentine meat. The case further finds that there was no mark of origin on or with the pound G of steak sold and handed to the purchaser, nor did the salesman orally declare its origin to the purchaser. Then there comes this paragraph in the case stated:

When the large rump was placed on the bench for the purpose of being cut, indications of Argentine origin branded on the rump were underneath the meat H cut, out of sight of the purchaser. The purchaser did not see the indications of origin and could not have seen them unless the meat had been turned over. The purchaser did not at any time request that the large rump should be turned over.

In that state of facts, it was contended by the appellant that an indication of origin is not conspicuously given within the meaning of the Merchandise Marks (Imported Goods) No. 7 Order, 1934 (S.R. & O., 1934, No. 727), and the Merchandise Marks Act, 1926, unless it is visible to the purchaser of those goods, to which the statute and the order apply. It was further contended that the portion of meat sold was at no time exposed for sale duly marked as on importation, and that the respondents are not protected by the proviso to art. 4 upon which they rely.

In my opinion, having attended to the exhaustive argument of Mr. Ives, this case is really too clear for argument. If the contention which was raised with success in the court below on behalf of the respondents was indeed right, this part of this legislation would have no effect at all. In my opinion, the words are perfectly plain. There was a clear infringement, and I will add only that, in my opinion, this Act of Parliament has for its purpose the protection of the purchaser, and is not for the protection of the butcher who desires to get for Argentine meat the price which is appropriate to English meat. The appeal ought to be allowed, and the case should go back to the justices with the direction that the offence which was charged was proved.

BRANSON, J.: I agree.

HUMPHREYS, J.: I agree.

Appeal allowed with costs.

Solicitors: *Solicitor to the Middlesex County Council* (for the appellant); *Wilfrid W. L. Ellis* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

EGAN *v.* LANGHAM INVESTMENTS, LTD.

[KING'S BENCH DIVISION (du Parcq. J.), **December 6, 7, 1937.**]

Money—Moneylending—Memorandum of loan agreement—Loan made up of previous loan and fresh loans—Necessity to state details of previous loan—Moneylenders Act, 1927 (*c.* 21), *s.* 6.

A registered moneylender was advancing £85 to a client, of which £79 was to be applied in paying an old loan to other moneylenders, and £6 was to be paid to the client. The memorandum, made in accordance with the Moneylenders Act, 1927, s. 6, did not state that part of the loan was to discharge the debt to the other moneylenders:—

HELD: the statute requires that the memorandum shall contain all the terms of the contract, and the fact that the debt of £79 was to be discharged out of the money lent was a material fact that ought to be set out in the memorandum.

[**EDITORIAL NOTE.** The memorandum is required to set out the fact that a previous loan is being paid off, because the repayment of that loan out of the borrowed money may very well be a condition of the loan.

AS TO MEMORANDUM OF LOAN, see HALSBURY, Hailsham Edn., Vol. 23, pp. 190, 191, para. 280; and FOR CASES, see DIGEST, Supp., Money and Moneylending, Nos. 353a-353y.]

Cases referred to:

(1) *Re Harmony & Montague Tin & Copper Mining Co., Spurgo's Case* (1873), 8 Ch. App. 407; 9 Digest 303, *1871*; 42 L.J.Ch. 488; 28 L.T. 153.

(2) *Sutton* v. *Leuchtenberg* (1933), not reported.

(3) *Dunn Trust, Ltd.* v. *Teale* (1928), not reported.

(4) *B. S. Lyle, Ltd.* v. *Chappell*, [1932] 1 K.B. 691 ; Digest Supp. ; 101 L.J.K.B. 185.

Action for a declaration that a bill of sale dated Oct. 20, 1936, granted by way of security, was unenforceable under the Bills of Sale Act (1878) Amendment Act, 1882, and the Moneylenders Act, 1927. The sub- A
stantial contention was that the memorandum of the loan (secured by a bill of sale) was insufficient under the Moneylenders Act, 1927, s. 6.

G. O. Slade for the plaintiff.

N. F. Stogdon for the defendants.

B

du Parcq, J. : For the purposes of my judgment, I can state the facts quite shortly. Mr. Egan had had several transactions with John Wallingford, Ltd. He was owing them money, and he wanted more money. He saw Mr. Purvis, the representative of Messrs. Wallingfords, who said that he could not increase the loan, but that he could C
introduce him to a man who sometimes did business for him. I think that he probably used those words, but it does not matter, as I am not finding now what exactly passed, because it is immaterial as the case now stands. At any rate, Mr. Egan went to the defendants, on the recommendation of Mr. Purvis. Being told that he owed £79 to D
Mr. Purvis, he had it in his mind to get as much as he possibly could, but in the end he got £85, which meant, he said, that he was to have £6 for himself, because he was to repay £79 to Mr. Purvis. I have heard a great deal of evidence as to the terms upon which the defendants lent the £85. No doubt Mr. Blakemore, having in mind certain decisions E
of the courts, was very anxious that the thing should be done properly, and that the matter should be in order, so as to show that he was entering into a transaction independent of the other transaction. They were anxious to do things according to rule. I do not say that it was honesty, but he was anxious, if he could, to comply with the requirements of the F
law. With regard to this first transaction of the defendants, I am told by them what is, I think, a rather remarkable story. The plaintiff says that, when he went to the defendants, a clerk of Messrs. Wallingfords was there, and he says that the clerk was in the waiting-room. Finally, he says—I need not go into all the questions about the inventory, G
and so forth—he was given a cheque for £85, and was then sent off with the clerk—he says that it was Mr. Brady—to the bank, where the cheque was cashed. They then came back and the 85 £1 notes were handed over. £6 was given to the plaintiff, and £79 was taken by Mr. Brady to pay Messrs. Wallingfords. That is a comprehensible account. What is said H
on the other hand, however, is that Mr. Blakemore trusted entirely to the honour of Mr. Egan. His only security was going to be a bill of sale over somewhat scanty furniture. He knew that Messrs. Wallingfords already had a bill of sale over the same furniture, which was very inadequate security for them, and yet, knowing that, he let Mr. Egan have the

money, and trusted entirely to him to pay off the other bill of sale and get it cancelled, although, when he let Mr. Egan have the money, he knew that that other bill of sale was in existence, and, but for the implicit faith which he put in Mr. Egan, there would have been nothing—and, indeed, there was nothing—but a moral obligation to prevent Mr. Egan from going off and squandering the money. I agree with Mr. Slade that that is a remarkable story, and on this point I much prefer the evidence of Mr. Egan, which I accept, though I do not know that it matters very much, because I have the evidence of Mr. Blakemore about that transaction. Mr. Blakemore's evidence is to this effect: "I would not have lent fourpence except on the footing that he paid off Wallingfords." I have no doubt at all, looking at the case as a whole, that it was agreed between the defendants and Mr. Egan, as a condition of their lending him money at all, and that it was a term of the contract under which the money was lent, that Wallingfords should be paid the £79, and they saw that Wallingfords were paid the £79. It was a part of the bargain and it was a part of the contract; I have no doubt about that. Then, when we come to the later date, there is a letter written, dictated by Mr. Blakemore to his typist and signed by Mr. Egan, saying:

> I beg to make application for a loan of £92 on the security of my furniture and effects, namely, a bill of sale, out of which advance I desire to pay off the balance outstanding on my existing account with your company.

That is an offer in legal language, and, where one has an offer in writing, one may find, and often does find, that other terms of the contract are not in writing, though they may be part of the offer, part of the acceptance, and negotiations which culminate in the contract. Here again I have the evidence of Mr. Blakemore, and he says that Mr. Egan agreed, when he applied for the money, that he would pay off the £79—that is to say, the £79 that Mr. Blakemore says was due to the defendant company—"and I would not have lent it except on that footing." That is to say: "I would not have lent the money I did lend except on that footing." There was an agreement, and I have no doubt that it was a term of the contract. I have not the slightest doubt that, if Mr. Egan had said: "Lend me this money; perhaps I will pay you out of it and perhaps I will not," he would not have got a penny. Nobody suggests that he would. There was an agreement. If ever there was an agreement, this was one.

That gives rise to a question of some interest, which I think is certainly not without some difficulty. The Moneylenders Act, 1927, s. 6 says:

> (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower. . . .

The section states that a copy is to be delivered, and so on. Then sect. 6 (2) says:

> The note or memorandum aforesaid shall contain all the terms of the contract

> and in particular shall show the date on which the loan is made, the amount of the principal of the loan. . . .

Now, let me look at that entirely apart from authority for a moment. I say "apart from authority," but I must qualify that by saying that one must keep in mind the cases decided under the Bills of Sale Acts. Those Acts provide that a bill of sale must be in the form set out in the A
schedule, and that schedule requires that the consideration should be set out in these terms, or the appropriate terms:

> This indenture made the day of , between A.B. of of the one part, and C.D. of of the other part, witnesseth that in consideration of the sum of £ now paid to A.B. by C.D., the receipt of which the said A.B. B
> hereby acknowledges [or whatever else the consideration may be]. . . .

Now, the courts had to deal with this class of case: they had to deal with the class of case where the consideration was said to be a loan of, let us say, £100, and where the only money that had passed was £20, the reason being that the man who had promised to lend £100 already C
had £80 owing to him by the other person, and he said in effect: "It is no use my handing you £100 for you to hand me back £80; it is no use going through the form and ceremony of handing money backwards and forwards. I will hand you the net amount which is due, having applied the loan in part to the repayment of what you already owe me." D
In dealing with that class of case, the court applied the principle of the case known as *Spargo's* case (1), where MELLISH, L.J., said, at p. 414:

> Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards E
> and forwards.

No doubt, so far as the bill of sale is concerned, the mere fact that the capital sum which is said to be advanced is not paid over to the borrower does not invalidate the bill of sale, because he may have borrowed that amount, although it was not handed over to him in cash. Mr. Stogdon, F
who has argued this case most clearly, and, if I may say so, most ably, said: "This is a bill-of-sale case, not a moneylending case solely." The answer to that, however, is that it is a case which it might have fallen upon me to decide under the Bills of Sale Acts. However, it does become my duty to decide it under the Moneylenders Act, and it may G
well be that the Bills of Sale Acts are complied with, and that the Moneylenders Act is not complied with. The contract may be set out accurately for the purposes of the Bills of Sale Acts, when the contract which it is required to set out in the note or memorandum is not properly set out for the purposes of the Moneylenders Act. Now, looking at it H
apart from authority, what is the contract? It is a contract for the repayment by a borrower of money lent. I agree with Mr. Slade that there are two sides to every contract, of course, and, when one looks at a contract for the repayment by a borrower of money lent, one is also looking at a contract under which the lender agrees to lend. The

borrower agrees to repay. The lender may impose terms of his own for the acceptance of the borrower, and the borrower, of course, may sometimes be able to insert into the contract terms which he suggests, which the lender accepts. Supposing it is not merely "I will lend you £x," but "I will lend you £x if you will use part of that £x for a specific purpose, and otherwise I will not lend it to you." I think that, apart from authority, one can say that that is a term of the contract for the repayment by the borrower of money lent to him. I do not think that the Act means that one must set out only half the contract—that is to say, the half which imposes upon the borrower terms as to repayment. I think that one must include all the terms of the contract under which, because money has been lent to him, it becomes obligatory upon him to repay it, and one of the terms of the contract under which that money has been lent to him may be a term which lies at the root of the contract, because the lender may say: Unless you promise this, I shall not lend the money; in other words, part of the contract for this loan is the promise that you are making to me. When one looks at Mr. Blakemore's own evidence, and at the whole of the facts and the inference to be drawn from them, it seems to me clear that, in the one case, there is a promise which was, and was intended to be, part of the contract to repay Wallingfords, and that, in the other case, there was a promise which was intended to be, and was, part of the contract to repay the former loan by the defendants, so that, apart from authority, I should say that that term of each contract ought to be included in the memorandum, and it is not included in the memorandum here. That is my view, apart from authority. I may perhaps say, incidentally, that I have expressed that view on a previous occasion in *Sutton* v. *Leuchtenberg* (2). I see no reason for changing the view I expressed there, but, of course, I should not seek to cling to that view. I should have no right to do so, and I should not desire to do so, if there had been any decision of the Court of Appeal which showed that the view I then held was wrong, or, to put it in another way, that the view held and expressed in *Dunn Trust, Ltd.* v. *Teale* (3), by Charles, J., was wrong. I cannot see that the Court of Appeal have ever indicated any dissent from the view of Charles, J., when it has been before them. On the contrary, when it was before the Court of Appeal, in what was no doubt an *obiter dictum*, Scrutton, L.J., said, in *B. S. Lyle, Ltd.* v. *Chappell* (4), that it was safer to follow the decision of Charles, J. All of us who remember Scrutton, L.J., know that, if he formed a view adverse to a view that had been expressed, he was not reluctant to express it, except when he thought it wiser not to express a view because it was not necessary to the decision of the case. I see nothing in his language to suggest that he thought that Charles, J., was wrong, and I read his language as meaning that provisionally, at any rate, and possibly subject to further argument, he was inclined to think that Charles, J., was right. I do not think that Scrutton, L.J., in terms would have advised people to follow that decision, or that he would have said that it was safer to follow it, if he had thought that it was inconsistent with the Act. The consequences of an opposite decision might be very grave. I think that in a case like this they would be very grave, because it is desirable that the court should know exactly what is the agreement between the parties. The consequences may be very grave where a moneylender says: "I will lend you the sum only on condition that you will apply a large part of it in purchasing from me, for a value which may be ten times its proper value, some chattel which I am prepared to sell to you." As I have said, I do not think that it is necessary to strain the language of the Act at all in order to give effect to what is contended for by Mr. Slade, but, if the words of the Act were ambiguous—and I do not say that they are; I do not myself think they are—then I am inclined to think that, although I know one must not interpret the Moneylenders Act more in favour of borrowers than in favour of lenders, by any means, still it would be right to say that the intention of the legislature must be that such a term as this should be included. As I say, however, for myself I see no ambiguity in these words. That is the position. I have been referred to a later unreported decision of the Court of Appeal, but I do not propose to go through it. It deals with other questions which were raised in the case, where Scrutton, L.J., used the words to which I have referred, but it does not in the least affect the decision of Charles, J., or the dictum of Scrutton, L.J., with reference to the decision of Charles, J. That decision of the Court of Appeal does not touch it.

The result is that I here take a view of this Act which is entirely in accordance with that of Charles, J. The Court of Appeal have considered the view of Charles, J., and, far from finding that they said that it was wrong, I find that Scrutton, L.J., seemed rather to approve it. In those circumstances, I think that my duty is clear, and that I must follow the decision of Charles, J. It is reasonably clear, from the report of the decision in the Court of Appeal, what he decided in that unreported case. I have no doubt that it applies to the facts of this case, as I have found them, that there was an omission in the memorandum, with the result that the plaintiff succeeds.

Solicitors: *Tudor & Rowe*, agents for *Gee, French & Entwistle*, Liverpool (for the plaintiff); *Tredgolds & Idris* (for the defendants.)

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

BEDFORD (DUKE) *v.* BUCKS WATER BOARD.

[CHANCERY DIVISION (Clauson, J.), **December 7, 1937.]**

Water Supply—Acquisition of land—Joint board—Agreement to acquire by constituent authority before board constituted—Bucks Water Act, 1937 (*c. xcv*), *s.* 38.

A water board constituted by a private Act consisted of representatives of a county council and four rural district councils, and it was provided by that Act that all agreements and conveyances, etc., made by these separate local authorities should on and after the appointed day be binding and of as full force and effect in every respect in favour of or against the board as if the board had been a party thereto. The county council before the appointed day proceeded with the provision of a new pumping station, and entered into an agreement, acting on behalf of the board, for the purchase of a site. It was contended that the agreement, having been entered into before the board was in existence, could not be binding upon it:—

HELD: the provision in the private Act made the agreement enforceable against the board.

[EDITORIAL NOTE. It is well known that a binding contract cannot be made with a company before it is formed, and a preliminary contract made with a nominee of the company on its behalf before incorporation must be adopted by the company after incorporation. In the present case, it is held that the provision in the private Act renders unnecessary any subsequent adoption of the contract by the board.

AS TO ACQUISITION OF LAND FOR PURPOSES OF WATER SUPPLY, see HALSBURY, 1st Edn., Vol. 28, Water Supply, pp. 255-259, paras. 479-482; and FOR CASES, see DIGEST, Vol. 43, pp. 1066-1069, Nos. 61-76.]

MOTION for an interlocutory injunction to restrain the defendants from enforcing a notice to treat served upon the plaintiff by the defendants and dated Nov. 28, 1937, and for a declaration that the said notice to treat was invalid and of no effect.

Cyril J. Radcliffe, K.C., and *C. L. Henderson* for the plaintiff.

R. M. Montgomery, K.C., and *Arthur Capewell* for the defendants.

CLAUSON, J.: On July 20, 1937, Royal Assent was given to an Act the short title of which was the Bucks Water Act, 1937. As appears from the title, it was an Act to constitute a joint board, consisting of representatives of the county council of the administrative county of Buckingham, and of the rural district councils of Aylesbury, Buckingham, Wing and Winslow, and to vest in the said board the water undertakings of certain of the constituent authorities, and to authorise the board to execute works for the supply of water and for other purposes. It should be noticed that the board were, according to the title, to have vested in them by the Act the water undertakings of certain of the constituent authorities. It is explained to me on behalf of the board that the purpose of that was that the county council of the administrative county of Buckingham had no water undertaking, but that the four rural district councils mentioned had, and, accordingly, it was to vest in the board water undertakings of four out of five of the constituent authorities.

The phrase " constituent authorities " is defined in sect. 4 of the Act, and it means " the county council, the Aylesbury Council, the Buckingham Council, the Wing Council and the Winslow Council." " Constituent authority " means " any one of those councils." The Act is to come into force, so far as the vesting of the undertaking is concerned, on the appointed day, which is Oct. 1, 1937. The Act provided that there should be a board called " the Bucks Water Board," constituted and appointed as by this Act provided for the purpose of carrying the Act into execution, and the board was to be constituted by representatives appointed by each of the five constituent authorities. The first appointment of members of the board by each constituent authority was to take place at a meeting of the authority to be held before Jan. 1, 1938. I was not told when the rural district councils appointed their representatives, but it appears from the evidence that, so far as concerns the representatives of the county council, they were appointed on July 22, two days after the Act had received the Royal Assent. Now, there seems some ground for supposing from the Act that Parliament contemplated that it might be desirable that certain steps should be taken by one or other of the constituent authorities before the water board had been finally constituted, and that those things so done by the constituent authorities should, for some purpose or other, be treated as things done by or on behalf of the board, although the board might not have been actually constituted at the date of the action in question. I say that because of two sections which appear in the Act, and which I shall now read. Sect. 38 is in these terms :

> Subject to the provisions of this Act all agreements, conveyances, contracts, deeds and other instruments entered into or made with or by the constituent authorities or by which they are bound in respect of any of the existing undertakings or the provision of new sources of supply or the extension of existing sources or the investigation of new sources or the acquisition of land which are respectively referred to in the section of this Act of which the marginal note is " Payments by board to county council " or the acquisition of land for the purposes of this Act and in force on the appointed day shall on and after the appointed day be as binding and of as full force and effect in every respect against or in favour of the board and may be enforced as fully and effectually as if instead of the constituent authority the board had been party thereto.

The second section which is material is referred to in sect. 38, which I have just read, as the section of which the marginal note is " Payments by board to county council," and is sect. 41 (1), which is as follows :

> The boards shall in consideration of the work done and the expenditure incurred or to be incurred by the county council before the appointed day in connection with the provision of new supplies of water within the limits of supply or the extension of existing supplies within those limits or the investigation of new sources of supply or the acquisition of land for the purposes of this Act or the construction of any works on the respective sites of Work No. 1 and Work No. 12 authorised by this Act pay to the county council on or as soon as reasonably practicable after the appointed day all sums reasonably expended by that council for such purposes together with interest at the rate of 3½ per centum per annum upon those sums from the respective dates on which they were so expended to the appointed day.

So far as relates to the four constituent authorities, which were, before the passing of this Act, water authorities, it seems reasonably plain that, if any of them had made contracts of the character indicated in sect. 38 in respect certainly of the particular water undertaking controlled by that particular company, anything done by that particular council would be binding on the board when the board was fully constituted, and could be enforced by the board and enforced against the board. I do not think that counsel for the defendants, in arguing the case, was concerned to dispute it. Indeed, he suggested that that was what sect. 38 had to do with. But it must be borne in mind that one of the constituent authorities—namely, the county council—was not a water authority, and, apart from something in the Act, it would not be within its powers if it concerned itself with such matters as providing a supply of water or investigating new sources of supply of water or acquiring land for the purposes of a water undertaking. It is suggested by counsel for the defendants—and it is suggested, I venture to think, perfectly correctly—that, apart from any statutory authority, the county council, not being a water authority, could not do any of these sorts of things, and that, if it spent any money on doing them, the expenditure would be *ultra vires.* I was not referred in detail to the various Acts under which the county council acts, and I am prepared to accept the suggestion by counsel that that would be the position, and that it would be *ultra vires* of the Buckingham County Council to concern itself with matters of that kind, or to spend money on matters of that kind. I venture to think that that consideration must have been present to the mind of Parliament when Parliament passed this Act.

That would seem to lead at once to this, that sect. 41 contemplates that, although, apart from what is said in this section, any such activities on the part of the county council would be *ultra vires*, the county council will in fact, during the period preceding the due constitution of the water authority, concern itself with such matters, and will concern itself with the provision of new supplies of water and with the extension of existing supplies, and with the acquisition of land for the purposes of this Act, because sect. 41 says that, if the county council does so concern itself, any money it spends is to be repaid to it by the new authority, when the new authority comes effectually into existence. After all, if Parliament contemplates that a statutory body, which *prima facie* has not got certain powers, and cannot exert certain activities, shall exert *de facto* those activities, and, if it does exert those activities, shall be recouped the expense of exerting those activities, that seems to me to be the exact equivalent of saying that the exercise of those activities is authorised by Parliament. When one looks again at sect. 38 and sect. 41, it seems to me reasonably clear that Parliament meant that, and meant that any one of these constituent authorities should, pending the proper constitution of the water board, concern itself in these matters, and that, in so far as it did concern itself in these matters, it should be treated as acting for the water board, with the result that expenditure will be recouped to it by the water board, when constituted, and that contracts and so forth made in the course of those activities should be treated as binding upon the water board. It is suggested that it is rather odd that Parliament should give five constituent authorities power to bind this future water board. As a matter of business, there is nothing odd about it at all. Here were these four water authorities and the county council putting their heads together to make a businesslike arrangement as regards the control of water within this particular area, and it was perfectly obvious, I should imagine, from the business point of view, that those sorts of things would be taken in hand by the county council, which was going to be represented to the extent of practically one-third of the number of members on the water board. Parliament assumes that those responsible authorities, these four district councils and this county council, would not hamper one another, nor enter into inconsistent arrangements. In fact, obviously it was the county council which would take over the whole thing.

Now, it is to be observed that, among the activities of the county council which were contemplated by sect. 41, and expenditure upon which was to be approved by the authority, was included, not only the acquisition of land for the purposes of the Act, but also the construction of any works on the respective sites of Work No. 1 and Work No. 12 authorised by this Act. Sect. 56, which gives power to the new authority to make waterworks, and so on, refers to Work No. 12 in this way:

> A pumping station (to be called the "Battlesden pumping station") with a well or wells boreholes adits and other works and conveniences connected therewith ancillary thereto to be situate in the parish of Battlesden in the rural district of Ampthill in enclosure numbered 55.

The work is to be done in the usual way, in accordance with the deposited plans and deposited book of reference.

It appears that, shortly after, or at the same time as, the county council had appointed the persons who were to be their representatives upon the new authority, arrangements were made for setting up a small committee of the county council to deal with certain matters. I am quoting from a report of one of the committees of the county council which required certain matters to be dealt with:

> the most important being the acceptance of tenders for the construction of the wells and adits at Battlesden and Wendover. It is suggested that action of this kind could be taken by the council through certain duly authorised representatives should the necessity arise, and this was approved by the joint water committee at their meeting on July 14. It is accordingly recommended that the council should authorise their chairman and vice-chairman, the chairman of the finance committee and Rev. F. J. Winterton to accept tenders for the works provided for under the Bucks Water Bill, and to take any other action on behalf of the council in connection with the water scheme generally which may be required before the first meeting of the Bucks Water Board.

It seems obvious that it was important to get on with this work, and to get on with the new pumping station as soon as possible. What happened in fact was that the committee, or their representative, acting for the Bucks County Council, but with a view to their action in future binding, under the provisions of the Act to which I have referred, the water authority, when the water authority came into being, got into touch with the plaintiff, the person who owned the particular piece of land referred to in respect of Work No. 12, upon which a pumping station was to be erected. He was the only person, of course, who had to be approached in the first instance, because even water authorities cannot erect pumping stations on property which does not belong to them or over which they have no control. Accordingly, communications were opened with the plaintiff in the way I have mentioned, and, as the result, a document was entered into between the county council of the one part and the plaintiff of the other part. The document is dated Aug. 28, 1937, and it was, of course, a little time before the appointed day. As a matter of fact, on that date, so far as the Bucks County Council were concerned, they had arranged their representatives, and had taken the first step towards the authority being constituted. There is no evidence actually before me as to whether at that time the other authorities had appointed their representatives. Of course, if they had appointed their representatives, there was in fact a duly constituted council, although it was not to meet until some date to be fixed by the Bucks County Council. That is under the provisions of the Act, to which it is not necessary for me to turn. I will assume for the moment that, when this document was entered into, the council had not been fully completed. It may be that, when the trial of this action comes on, if it ever does come on, it will appear that in fact the water authority was duly constituted at the time, but I am assuming that it was not.

The agreement is in these terms:

> The Bucks County Council acting on behalf of the Bucks Water Board through their chairman in consideration of being granted immediate entry upon the site of 3 acres adjoining the London-Holyhead road at Battlesden for the purposes of a pumping station hereby undertake. . . .

Then there is a provision about the conveyance, and there is a provision that the purchase price shall be fixed by Mr. Robinson, and the decision shall be final and binding on both parties. The agreement continues:

> The water board shall pay interest thereon at the rate of 4 per cent. per annum from the date of entry until the date fixed for completion of the purchase, the date of entry being Sept. 1, 1937.

Then there is a provision about the water board paying the tenant certain sums and indemnifying him against claims for damage or injury and so forth, and in default of agreement the amount to be fixed by Mr. Robinson. Then there is a provision as to fencing and so forth, and some particular arrangement for the supply of water to the plaintiff. Then there is a provision that:

> The board will pay the Duke of Bedford's legal charges incidental to the negotiation of this agreement and the conveyance and duplicate and the stamp duty and any necessary payments. . . .

Then there is an arrangement as to the arbitrator's fees, and there is a schedule containing various provisions as to title, and so forth, and as to completion.

Now, quite plainly, that was an agreement for the purchase from the plaintiff on behalf of the new authority of the piece of land therein referred to. I have evidence as to what the piece of land referred to was. It was a piece of land, as I understand it, which was, as regards the greater part, within the area over which, by virtue of the Act, the new authority would have compulsory powers of purchase, and, as regards a small portion, outside their area, but land over which the authority would have powers of purchase by agreement. I merely mention it because it is not disputed that they wanted a site of a particular size, and, as laid out for the purpose on the deposited plans, it seems to have included a bit of land which, I suppose, was part of the highway. So in fact the piece of land agreed to be sold was a little different from the piece of land for which compulsory powers were anticipated.

That agreement was entered into, and, by virtue of that agreement, the people concerned in the works which were to lead to the erection of the pumping station appear to have been put into possession of the property. Immediate right of entry was given to those who were acting on behalf of the authority which was about to come into existence, and now, the board being in existence, the board is in possession, and its contractors, as I understand, are doing work upon this piece of land.

So far, the matter seems quite simple and straightforward. The arbitration was held, the parties came before the arbitrator, and then a difference of opinion arose. It was suggested on behalf of the board that certain statutory provisions relating to the compulsory acquisition of land applied to the arbitration, and tied the arbitrator's hands in certain respects. That was a view with which the plaintiff's advisers did not agree, and ultimately the arbitration stood over with a view to the matter being further considered and further argued, and dealt with in some way in the course of the arbitration or proceedings ancillary to the arbitration. In the meantime, some very ingenious person seems to have thought: "Now, of course, if a notice to treat has been given, and the board has taken this land under compulsory powers, there is no need to continue arguing this point, because, of course, it would be quite plain that, as the arbitration would be an arbitration operating by reason of the compulsory powers operating, these statutory provisions which would bind the arbitrator will not apply to such an arbitration." So the board proceeded to serve on the plaintiff a notice to treat. Now there comes the oddest feature of all: the notice to treat, of course, if it were to be any good at all, had to be confined to the portion of the land of which the board had taken possession, over which compulsory powers extended, which was some $\frac{13}{14}$, or something of that kind. In giving the notice to treat, referring particularly to the land comprised within the compulsory powers, a covering letter was written with the notice to treat, to the effect that, although the notice to treat referred to the bit of land within the compulsory powers, it would, of course, be treated, for the purpose of assessing the purchase money and for the purpose of conveyance, as referring, not to that, but to the piece of land which was in fact the subject-matter of the agreement which I have mentioned.

At some time, the effect of such a covering letter on the notice to treat will have to be considered. I mention the matter only because I want it A to be perfectly clear that nothing falling from me is to give any colour to the suggestion that there is any invalidity at all in the notice to treat, in those circumstances and with such a covering letter. But that is not the point upon which my opinion is really desired on this motion, and so I will say no more about it. I merely do not want it to be supposed B that I have given any countenance to the supposition that it is invalid at all. I will treat the matter, for the purpose of the rest of my judgment, as though the notice to treat referred to a piece of land the whole of which was within the compulsory powers, and accordingly presented no difficulty in that regard at all.

C That notice to treat having been served, this action is started, and the plaintiff moves for an injunction to restrain the defendants from acting upon the notice to treat. The defendants' counsel, with that characteristic candour which we all expect from Mr. Montgomery, said at once that he was bound to admit that, if there was a binding contract, the D notice to treat must, of course, be absolutely fatuous and ineffective and inoperative, because a body cannot give notice to treat for the acquisition of land which already belongs to it in equity, subject to its paying the purchase money which it has to pay under the contract. So it is common ground, as I understand, that the plaintiff must succeed in obtaining the E injunction for which he asks, unless the defendants can satisfy the court that the contract which I have mentioned is a contract which does not bind them, the defendants. There we get to the real point in this case. Does this contract, entered into in the circumstances I have mentioned, not by the defendants but by the County Council, at a time when F I am assuming the defendants were not a constituted body, bind the defendants? In my view, it is impossible for me, in view of the statutory provisions of sects. 38 and 41 of this Act, to hold otherwise than that it does bind the defendants.

The argument is put in this way. It is said that the Buckinghamshire G County Council was acting *ultra vires* in entering into this agreement. It was accordingly a nullity, and a nullity cannot be enforced against the board, even under sect. 38. The answer seems quite plainly to be that this contract was not a nullity at all. It would have been a nullity apart from the Act, no doubt, but it is impossible to make sense of the Act H except on the footing that the Buckinghamshire County Council is to be in a position to concern itself in these various activities as the *quasi*-agent of the board before the board is properly constituted, and, in so far as it concerns itself in its activities—the searching for water and arranging for the acquisition of land, and so forth—it is to be treated as in effect the agent of the board. Unless that is the meaning of sects. 38 and 41, I confess that I do not understand what the meaning can be. It was a little plausible to suggest that sect. 38 referred only to such of the four constituent authorities as had water powers, but, when one reads sect. 38 with sect. 41, it is quite plain that the County Council, though not a water authority, was contemplated as being about to concern itself in water affairs for the purposes indicated in the Act.

In my view, the contract is binding upon the defendants, and I cannot but grant the plaintiff the injunction for which he asks, to restrain the defendants from enforcing the notice to treat. The parties agreeing to treat the motion as the trial of the action, there will be a perpetual injunction, the defendants to pay the costs of the action.

Solicitors: *Reynolds & Co.*, agents for *R. Hobourn*, Woburn (for the plaintiffs); *Pyke, Franklin & Gould*, agents for *H. A. Foley*, Aylesbury (for the defendants.)

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

WADHAM *v.* WADHAM.

[Probate, Divorce and Admiralty Division (Bucknill, J.), **December 7, 8, 15, 1937.**]

Divorce—Variation of settlements—Power of appointment upon petitioner's second marriage—Children's reversionary interests affected—Principle of quid pro quo—Acceleration of respondent's power to appoint upon second marriage refused—Costs—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 192.

By an ante-nuptial settlement, the wife's parents brought into settlement property worth £240,000, and the husband brought in property worth £10,000. The wife was to have the income from her fund for life, and the husband the income from his fund for life. After the death of the survivor, the trustees were to hold the property brought into settlement for the children or remoter issue of the marriage as the husband and wife should jointly appoint, and, in default of appointment, in trust for the children of the marriage in equal shares. The survivor of the husband and wife was given a power after the death of the other, and either in contemplation of, or after, his or her future marriage, to appoint that part of the capital should be withdrawn from the settlement, and be held upon such trusts for the benefit of the after-taken husband or wife or such survivor and the issue of such future marriage. The power of withdrawal was limited to one third part if there were two or more children of the marriage who should attain 21, or, in the case of a girl, marry under that age, and was limited to a half if there should be only one such child. There were two children of the marriage, and, a decree *nisi* having been made for the dissolution of the marriage upon the petition of the wife, based on the adultery of the husband, the registrar recommended: (i) that the joint power of appointment over the wife's fund should be revoked, and that the wife should exercise that power as if she had survived the husband, and no objection was taken to this; (ii) that the power of withdrawal should be exercisable forthwith by the husband or the wife as if the other had died in his or her lifetime:—

Held: (i) if the wife should secure a sum of £250 per annum gross to each of the two children on attaining the age of 21 or on marriage, her power of withdrawal should be varied as prayed; if she failed to secure such annual sum to the children, then her power of withdrawal should be varied as prayed, but should be limited to two-thirds of the amount which she was empowered to withdraw upon the death of the husband.

(ii) the husband's power of withdrawal should not be varied in any way.

[**EDITORIAL NOTE.** The variation of the power of withdrawal is subject to such variation not being to the prejudice of the children of the marriage. In the present case, the amount of the wife's fund was such that, even had the power of withdrawal been accelerated, there would have been a very large sum of money available for the children. It could not be said, however, that the interests of the children would not be prejudiced by such an order, and the court has stipulated for a *quid pro quo*, or, in the alternative, for a limitation of the power of withdrawal. It is said that there is no precedent for allowing any variation in the case of a guilty husband.

AS TO VARIATION OF POWERS OF APPOINTMENT ON RE-MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 804, 805, para. 1281; and FOR CASES, see DIGEST, Vol. 27, pp. 525, 526, Nos. 5667-5684.]

Case referred to:

(1) *Whitton* v. *Whitton*, [1901] P. 348; 27 Digest 519, *5600*; 71 L.J.P. 10; 85 L.T. 646.

MOTION by the petitioner to confirm the registrar's report on her petition for variation of settlements. The terms of the settlement and the facts are fully stated in the judgment.

R. F. Bayford, K.C., and *W. Latey* for the wife, the petitioner.

Hon. Victor Russell for the husband, the respondent.

Andrew Clark for the infants.

M. G. Hewins for the trustees.

BUCKNILL, J.: This petition for variation of settlements is dated Nov. 4, 1937. It sets out that the petitioner was married to the respondent on Apr. 29, 1929, and that there are two children of the marriage, both girls, born in 1930 and 1931 respectively. On Apr. 9, 1937, a decree *nisi* was made for the dissolution of the marraige on the prayer of the petitioner, based on the adultery of the respondent. On the day of the marriage, an ante-nuptial settlement was executed. Under it the petitioner's parents brought into the settlement property worth £240,000, or thereabouts, on certain trusts, and the respondent brought in property worth £10,000, or thereabouts.

By the terms of the settlement the petitioner was to have the income for life of her fund, and the husband was to have the income for life of his fund. After the death of the survivor of the petitioner and the respondent, the trustees were to hold the property brought into settlement for the children or remoter issue of the marriage in such manner as the respondent and the petitioner should jointly appoint, and, in default of appointment, as the survivor of them should appoint, and, in default of any appointment, in trust for the children of the marriage in equal shares.

On this part of the case the registrar has recommended that the joint power of appointment given to the respondent over the petitioner's fund be revoked, and that the petitioner shall exercise the power as if she had survived the respondent. No objection is taken, on behalf of the children of the marriage, to this. If the report be confirmed, the wife will therefore have power to appoint the whole of the £240,000 to either of the two children, or to the issue of one child of the marriage.

By a subsequent clause in the settlement it was provided that the survivor of the respondent and the petitioner might at any time after the death of the other, and either in contemplation of, or after, his or her future marriage, appoint that a part of the capital should be withdrawn from the settlement, and be held upon such trusts for the benefit of the after-taken husband or wife or such survivor and the issue of such future marriage. The settlement further provided that the part of the survivor's fortune which may be appointed under the power of withdrawal shall not exceed more than one third part, if there are two or more children of the marriage between the petitioner and the respondent who shall attain the age of 21, or, in the case of a girl, shall marry, and shall not exceed a moiety of the fund if there shall be only one such child.

On this point the registrar has recommended that the power of withdrawal given to the petitioner and the respondent shall be exercisable forthwith by each of them as if the other had died in his or her lifetime, and as if he or she were the survivor. Under this recommendation, the petitioner, who is about to marry again, can withdraw approximately £80,000 from her fund, and the respondent can withdraw about £3,000 from his fund. If one of the children dies before marriage, or reaches the age of 21, whilst the parents are alive, then the petitioner or the respondent can possibly withdraw further sums—in the case of the petitioner a further £40,000, and in the case of the husband a further £2,000.

Counsel who appeared on behalf of the guardian *ad litem* for the children and their possible issue strenuously opposed this part of the registrar's recommendation. He argued that the result of such a variation would be to deprive one or other or both of the children of the marriage of their interest in a very large sum of money, without any financial compensation. No more children could be born of the marriage, because it had been dissolved, and he argued that the children should receive some pecuniary compensation for this loss to them, either by the wife now undertaking to make provision for them on their marriage or on reaching the age of 21, or else by limiting the amount to be withdrawn to something less than the full amount of one-third or one-half.

On the other hand, Mr. Bayford, on behalf of the wife, argued that the children of the marriage were adequately provided for. They will each receive about £80,000 eventually, or, if there is only one to receive the benefit, the sum of £120,000. In addition to this sum they have interests under their grandfather's will in a sum of £15,000, as well as their interest in a share of the respondent's fund in the settlement.

He argued that the Judicature Act, 1925, s. 192, empowers the court to vary the settlement for the benefit either of the children of the marriage, or of the parties to the marriage. The word is " or " not " and." It is therefore not necessary that the variation should be for the benefit of the children, if it is for the benefit of the wife.

In my opinion, in this case it is for the benefit of the wife, who is now only 28, that she should be able to bring some money into settlement for the possible children of her second marriage. On this aspect of the case, it is useful to remember the words of SIR FRANCIS JEUNE, P., in *Whitton* v. *Whitton* (1). That was a case like this, in that it was a petition for variation of settlements, and the question arose as to whether the wife should be given a power of appointment to the children of the future marriage. SIR FRANCIS JEUNE, P., said, at p. 353:

> It appears to me a desirable thing to do if one can. It would be hard that a wife who is freed by the misconduct of her husband should not be able to appoint anything at all in favour of a second husband, or in favour of the children of a second marriage; and if, without substantial injury to the interests of the children of the first marriage, such an arrangement can be made, I think it is desirable and is in accordance with the spirit of the Act of Parliament.

The next question is whether the variation is for the benefit of the children. From a domestic point of view, it may be desirable that the mother should marry again, so that the children should have a stepfather. From a financial point of view, the variation is clearly prejudicial. If no variation of the settlement is made, and it is left untouched, and the petitioner dies before the respondent, she will never be able to withdraw any part of the fund. The respondent is only six years older than the petitioner. I do not think that the proposed variation should be allowed merely because there is sufficient financial provision for the two children if even £80,000 is withdrawn. The proposed variation as to powers of withdrawal is clearly prejudicial to the two children, and I think that, as a condition of such variation, they should gain some financial benefit. The petitioner's mother, who was appointed guardian *ad litem* of the children at the hearing before me, on the representation of counsel representing the children that a guardian *ad litem* was essential in such a case as this, did not oppose the variation as to the power of withdrawal of the fund by the petitioner, but recommended that, as a *quid pro quo*, provision of an income of, say, £250 per annum for each child on marriage, or on attaining the age of 21, should be made by the petitioner. I have no power, I think, to direct that such a provision be made, but I understand from Mr. Bayford that the petitioner is willing to make such a provision. I therefore direct that, if the petitioner enters into a deed satisfactory to the guardian *ad litem* securing the sum of £250 per annum gross to each of the two children on reaching the age of 21 or on marriage, the petitioner's power of withdrawal shall be varied as prayed. Alternatively, I direct that her power of withdrawal be varied as asked in her petition, but be limited to two-thirds of the amount which she would be empowered to withdraw on the death of the respondent.

The only question remaining is whether the guilty husband should also be empowered to anticipate his right of withdrawal. Mr. Victor Russell, who appeared on behalf of the respondent husband, admitted that it was very unusual, and, indeed, so far as he knew, unprecedented, that a delinquent husband should be allowed, in such a case as this, to anticipate his power to withdraw a share of the fund immediately, as was recommended by the registrar, and as prayed by the petitioner in her amended petition. It seems to me that the husband in this case, who is the father of the two children, and who has put an end to the marriage tie by his conduct, should not be permitted to anticipate his right to withdraw his share of the fund which he has brought in. Such an anticipation is clearly not for the benefit of the children of the marriage, and indeed is prejudicial to them, and no reason has been put forward for such a variation.

Report varied by striking out the anticipation by the respondent of his power of withdrawal, and by altering the power of withdrawal by the petitioner in the manner stated, half the costs to be paid out of income and half out of capital.

Solicitors: *Simmons & Simmons* (for the petitioner and the guardian *ad litem*); *Burton, Yeates & Hart*, agents for *Hart Jackson & Sons*, Ulverston (for the respondent); *Hunters* (for the trustees).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

MUSSEN *v.* VAN DIEMEN'S LAND CO.

[CHANCERY DIVISION (Farwell, J.), **April 6, November 22, 23, 1937.**]

Equity—Penalty—Contract for sale of land—Purchase price payable by instalments—Retention of moneys paid upon default by purchaser.

By an agreement in writing, made in 1927, the defendant company were to sell to the plaintiff for £321,000 certain lands in Tasmania. The money was to be paid in certain instalments, and, according to the amounts so paid by instalment, the plaintiff was to be let into possession of certain parts of the land. Upon default by the purchaser in the payment of any instalment, the defendant company might by notice in writing rescind the contract, and they were to retain all moneys already paid by the plaintiff. In 1931, the plaintiff found himself unable to raise the moneys payable under the contract. The defendant company gave him notice to rescind the contract, and retained about £40,200, being the amount which the plaintiff had paid in excess of the price of the land which had actually been conveyed to the plaintiff. In the present action the plaintiff claimed a return of that sum of £40,200:

HELD: the provision in the contract for the retention of all moneys already paid by the plaintiff was not a penalty, and the plaintiff was not entitled to recover the sum of £40,200, or any part thereof.

[**EDITORIAL NOTE.** In this case, the plaintiff admittedly came too late to ask for specific performance of the contract, and he relied upon the doctrine that the court leans against the enforcing of a forfeiture. The plaintiff, being an experienced business man, of sound mind, must be taken to have entered into the contract with a full realisation of the effect of all its terms, and there was no reason for the court to interfere. In the circumstances, it was not unconscionable for the defendants to retain the money paid.

As to Penalties, see HALSBURY, Hailsham Edn., Vol. 13, pp. 189-192, paras. 177-180; and for Cases, see DIGEST, Vol. 20, pp. 518-521, Nos. 2451-2478.]

Cases referred to:

(1) *Sloman* v. *Walter* (1783), 1 Bro. C.C. 418; 20 Digest 519, *2459*.

(2) *Steedman* v. *Drinkle*, [1916] 1 A.C. 275; 20 Digest 517, *2440*; 85 L.J.P.C. 79; 114 L.T. 248.

Action for a declaration that the plaintiff was entitled to repayment of such part of the moneys paid to the defendant company by the plaintiff for the lands and other assets comprised in the agreement referred to in the judgment as was not attributable to the purchase price of the property known as the Surrey Hills block and South Burnie site, with interest thereon. The plaintiff also claimed £40,200, as money had and received by the defendant company to the use of the plaintiff, with interest thereon. In the alternative, he claimed an account.

F. R. Evershed, K.C., and *W. Gordon Brown* for the plaintiff.

Cyril Radcliffe, K.C., *A. Andrewes Uthwatt*, and *Ian S. Macdonald* for the defendant company.

Farwell, J.: An agreement in writing dated Nov. 2, 1927, between the defendant company of the one part, and the plaintiff of the other part, recited that the purchaser had paid to the company £4,000 on account of the sum of £321,000 thereinafter mentioned, and it was agreed that the defendant company should sell to the plaintiff for £321,000 the lands belonging to the defendant company in Tasmania, and all stores, livestock, farm plant, office furniture, and other equipment therein mentioned. It was further agreed that the balance of £317,000 should be payable as follows:

> (*a*) £15,000 without interest on or before the expiration of six calendar months after the date of the resolution of the shareholders of the land company approving this contract . . .; (*b*) £100,000 . . . together with interest thereon from the date fixed for payment of the £15,000 at the rate of 4 per cent. per annum on or before the expiration of two years after the date fixed for payment of the £15,000 . . .; (*c*) £50,000 without interest on or before the second anniversary of the date fixed for the payment of the £15,000; (*d*) £100,000 in two equal annual instalments of £50,000 each without interest on the two successive anniversaries of the date of payment of the £100,000 mentioned in subclause (*b*) hereof; (*e*) £52,000 without interest on the third anniversary of the date of payment of the £100,000.

Clause 6 of the agreement provided:

> Upon receipt of £100,000 and interest mentioned in cl. 2 (*b*) hereof the land company will convey to the purchaser or his nominees at the cost and expense of the purchaser the unsold portion of the Surrey Hills block estimated to contain 122,839 acres or thereabouts including roads, and upon the receipt by the land company of a further £12,500 to be paid upon the same day as the £100,000 and interest (and which £12,500 is to be credited as part payment of the first instalment of the £50,000 payable under the provisions of cl. 2 (*d*) hereof) the land company will con-

> vey to the purchaser or his nominees at the cost and expense of the purchaser the sections at or near South Burnie set forth in the schedule hereto and on the plan hereunto annexed coloured green and in each case the conveyance shall be delivered to the purchaser or his nominees together with any relevant abstracts of title and thereupon the purchaser or his nominees shall be entitled to full possession and enjoyment of the lands conveyed and the land company shall enter into the usual covenants for title further assurance and otherwise.

Clause 9 provided:

> Upon payment by the purchaser of the said sums of £100,000 and interest and £12,500 and the execution of the conveyance and delivery of possession referred to in cl. 6 hereof the purchaser or his nominees shall be put into full possession of the residue of the lands agreed to be sold and the rents and profits thereof thereafter accruing and of the stores livestock and other equipment.

Clause 10 provided:

> A schedule of the values for the purposes of this agreement and with a view to protect the interest of the land company of all lands agreed to be sold under this agreement (including the lands mentioned in cl. 6 hereof) has been prepared by the manager of the land company and the total of such values is the sum of £321,000 less the agreed-upon value of the stores livestock and other equipment.

Clause 12 provided:

> If the purchaser shall make default in the payment of any of the other instalments mentioned in cl. 2 hereof or any part thereof on the due dates as provided in the said clause the land company may (but subject to and without affecting in any wise the sale and the conveyance or the right thereto under cl. 6 hereof) by notice in writing sent by registered letter and addressed to the purchaser specifying which of the remedies hereinafter mentioned the land company intends to exercise rescind this agreement and may either enter into possession of any lands stores livestock and other equipment remaining unsold thereupon all moneys already paid by the purchaser shall be absolutely forfeited to the land company and this contract shall subject as aforesaid thereupon become absolutely null and void or may subject as aforesaid resell the same at the purchaser's risk either by public auction or private contract (either together or in lots) subject to such stipulations as it may think fit and in such case any deficiency in price after giving credit for all sums paid by the purchaser or his nominees as part payment of the sum of £321,000 which may result on such resale and all expenses attending such resale or attempted resale shall be made good by the purchaser and shall be recoverable as liquidated damages by the land company and any surplus arising from such resale and realisation shall belong to the purchaser and for the purpose of this clause time is of the essence of the contract.

By cl. 14, the agreement is made subject to the approval of the shareholders of the defendant company, and it is provided that all moneys payable under the agreement, except certain moneys payable by the purchaser on sub-sales, shall be payable in London.

Some months after the execution of the agreement, the shareholders of the defendant company duly approved it, and thereupon the contract became a binding contract, and the plaintiff paid the defendant company in London, on the execution of the contract, the sum of £4,000, as recited in the contract as having been paid. On May 2, 1928, in pursuance of cl. 2 of the contract, the plaintiff paid the sum of £15,000 on account of the purchase price. Then, by arrangements made between the plaintiff and the defendant company, certain of the provisions of the contract were varied, so that, on due payment by the plaintiff of the sum of £100,000 and interest falling due on May 2, 1930, and the sum of £12,500, part of the sum of £50,000, also falling due on the said date, the defendant company, in accordance with the provisions of cl. 6 of the agreement, would convey to the plaintiff the Surrey Hills block and the South Burnie site, and would postpone for one year the date for payment of the sum of £37,500, the balance of the said sum of £50,000, on the terms that the sum of £37,500 should carry interest at the rate of 6 per cent. per annum, and that the defendant company should retain possession of the residue of the lands and the stock. In pursuance of the agreement as so varied, the plaintiff, on May 2, 1930, paid to the defendant company in London the sums of £100,000 and £12,500, together with £8,000 interest on the first-mentioned sum, together making a sum of £120,500. The defendant company in due course conveyed to the plaintiff two blocks of land, the Surrey Hills block and the South Burnie site, but they retained possession of the residue of the lands and the stock. The purchase price of the Surrey Hills block and the South Burnie site as specified in the schedule to the contract was £99,300, and the total sums paid to the defendant company amounted to £139,500, leaving a difference of £40,200.

In Jan., 1931, the plaintiff, owing—as I will assume, and according to his evidence—to no fault of his own, found himself in difficulties about raising the money to enable him to complete the contract. That there were serious financial difficulties in Australia and Tasmania at or about 1928 to 1930, and possibly a little longer, is almost common knowledge, and the plaintiff, having many business interests, found it impossible to raise the necessary money to enable him to complete the contract. He accordingly endeavoured to get the defendant company to agree to some form of postponement of the payments which were still due. Certainly it is quite plain that that was the position, and it is hardly necessary even to refer to the fact that the Australian Parliament thought it necessary to pass an Act to provide a moratorium for relieving the difficulties which had arisen. The defendant company, however, was not prepared to extend the time for the future payments, and the plaintiff found himself unable to pay the instalment of £37,500 which became due, whereupon the defendant company put an end to the contract by a notice, dated May 4, 1931, which was given to the plaintiff and which was in these terms:

> Dear Sir, The payment to be made by you to the company on May 2, 1931, not having been punctually made under the provisions of the agreement dated Nov. 2, 1927, made between the company of the one part and yourself of the other part, the company hereby gives you notice pursuant to cl. 12 of that agreement that it hereby rescinds the said agreement and elects to enter into possession of any lands, stores, livestock and other equipment remaining unsold.

The defendant company acted on that notice. They were already in possession under the temporary arrangement made in 1930 which I have already mentioned, and they entered into possession finally, putting an end to the mere temporary occupation. They entered in, and remained in possession as the owners of the property, and they also retained the moneys which had already been paid.

The plaintiff took no immediate steps to recover the money but, on Mar. 15, 1935, a firm of solicitors in Melbourne wrote to the defendant company on behalf of the plaintiff and intimated that they had a claim against the defendant company for the recovery of the sum of £40,200, which was the difference between the price of the land which had in fact been sold to the plaintiff as shown in the schedule to the agreement and the money which he had actually paid. Beyond that letter, nothing further was done in the matter until, on Sept. 9, 1936, the plaintiff by his solicitors in London wrote and made a claim against the defendant company, which claim the defendants repudiated. Accordingly, on Oct. 27, 1936, this action was begun.

In those circumstances, this action has come on, and I have heard evidence from the plaintiff, who has given his reasons why he was not in a position to complete this contract in 1931. He has further given certain evidence with regard to his object in purchasing this property and his endeavours to start producing wood-pulp from the trees on this territory. The defendant company was armed with evidence of the values of these properties at various times, and this evidence was intended, I imagine, to show that it would be impossible now to give reasonable compensation, if there was any loss, to the plaintiff. It has, however, been agreed between the parties that, before going into that evidence, it is desirable from the point of view of everybody to determine whether such evidence is necessary at all, because, if the plaintiff is not entitled to relief in this case in any event, then it is obvious that it would be a great waste of time to consider that somewhat voluminous evidence. I am, therefore, for the moment dealing with this case as a question of law on the facts which I have stated: Aye or no, is the plaintiff entitled to relief?

I think that the first question which I must consider is: What was the effect of the notice given by the defendant company to the plaintiff of the rescission of the contract? It is suggested on behalf of the plaintiff that that letter, read in conjunction—as, of course, it must be—with cl. 12 of the agreement, has the effect of making the contract null and void *ab initio*. In my judgment, that is not the true construction of the letter and of the term of the contract. The term of the contract in cl. 12 seems to me to be quite reasonably plain. It provides that, in the event of a failure to pay the instalments, the defendant company shall have the option either of putting an end to any further obligations under the contract, and retaining the money already paid, or of selling the land and looking to the plaintiff to make good any loss which may occur as the result of such sale. It is quite true that in cl. 12 it is provided that subject as aforesaid the contract shall become null and void if the first of these two alternative courses—namely, that of giving notice and retaining the money paid—is taken, but, in my judgment, it clearly never was the intention of the parties that the contract should be null and void in the sense that it should be treated as though it had never existed at all.

In my judgment, it is quite plain that that is not what the parties intended. No doubt the word "rescission," or the word "rescind," is capable of having two meanings. The rescission of a contract may mean putting an end to it altogether—that is to say, making it null and void *ab initio*—or it may mean putting an end to the contract merely so far as any further performance of it is involved. It is perfectly plain in this case that, when the defendant company rescinded this contract, it was not treating the contract as null and void *ab initio*, and was not intending to treat it in that way. What it was saying was this: "You, the plaintiff, have not performed your part of the contract, because you have not paid this instalment at the due date. The company, therefore, as provided by the agreement, give you notice that they are not any longer bound to carry out the terms of the contract. They do not propose any further to carry out the terms of the contract, but they do intend to retain, under the contract, and as provided by the contract, the money which you have already paid to them."

If that be the true view of the effect of the notice to determine this agreement, then it is plain that no claim can be made here on the footing of a claim to recover money had and received. A claim for money had and received is based on the assumption that the money in the hands of the defendant company is, and was at all times, the money of the plaintiff, which the company was holding for his use. If the money was in fact paid to the company on the terms of the contract, under which it became the money of the company, there can be no possible ground for a claim to recover it as money had and received. The money is, and was at all times, after the date of payment, under the terms of the contract, the money of the company, and there is no possible ground for suggesting that the plaintiff can maintain a claim for this money as money had and received by the defendant company for the use of the plaintiff. I think that Mr. Evershed appreciated that difficulty and based his case on a totally different proposition. He has applied for leave to amend in order to raise the point with which I am now going to deal, and I have given him that leave, subject to any proper provision which I may think fit to make with regard to the costs of, and occasioned by, the amendment.

The case which the plaintiff really seeks to make here is this. He says: "The provision in this agreement for the forfeiture in certain events of the instalments paid was in the nature of a penalty, and, being a penalty, a court of equity is entitled to relieve, and ought in such a proper case as the present to relieve, the plaintiff by ordering the defendant company to give back to him some part, if not the whole, of the money which has been paid by him to the company under the agreement." Several authorities have been referred to, and there is no doubt that there are cases in which a court of equity, as distinguished from a court of law, will relieve against penalties. The basis, and the whole basis, of such an equitable doctrine—and, indeed, of all equitable doctrines—is that it is for some reason or another against conscience for the person who has the money in his hands to retain it and to refuse to repay all or part of it to the person who originally paid it. It was that doctrine which originally enabled the court of equity to relieve a mortgagor against what was thought to be, possibly, the hardness of the common law. At common law, there being an agreement to pay the money at a particular date, the money had to be paid on that date, and, if it were not so paid, the property thereupon became the property of the mortgagee. The court of equity took the view that that was never the true intention of the parties, and that neither of the parties had contemplated that there should be a sale of the property, or that the property should pass to the mortgagee, merely because there was a failure to pay on the particular day, the whole basis of the contract being a contract of security. The court of equity said: "Although in law the mortgagee is entitled to the property, in equity it would be against conscience to permit him to take advantage of the position, and, if the amount properly due can be paid with interest, then the mortgagee will be put into the position of getting all the benefits which he ever intended to get under the contract." To that extent, the court will relieve the mortgagor.

Similarly—as, for instance, in *Sloman* v. *Walter* (1)—where the parties entered into a partnership whereby it was agreed that the business should be conducted by the plaintiff entirely, but that the defendant should have the use of a room on the premises, and to enforce that agreement a bond was entered into by the plaintiff and defendant for a penalty of £500, it was held that the court of equity could relieve against the payment of the £500. In law, of course, the money was payable, and at law there was no answer to a claim to enforce the bond, but in equity it was said: "No, that was not the intention. The intention of the parties was that the £500 should be a penalty—really, as it were, something which was to compel performance of the contract by the plaintiff—and, it not being a sum for liquidated damages, the court will say that it was never intended that the £500 should be paid if the agreement was carried out in fact, and the court will relieve in those circumstances."

In the present case, I have to consider this position. The parties on both sides being of sound mind, and, in the case of the plaintiff, an experienced business man, enter into a contract under which the plaintiff agrees to buy for a very large sum of money certain properties in Tasmania. The defendant company is willing to sell the properties on certain terms. No doubt the defendant company would have been quite satisfied if the £321,000 had been paid down there and then on the signing of the contract, but that was not the bargain made, possibly because that was not convenient to the plaintiff, but it matters not what the reason was. In fact, the bargain was that the money was to be paid by certain instalments. Part of the contract was that, if the plaintiff should fail to pay any of the instalments at the due date, then the defendant company should have the right to put an end to the further performance of the contract, and should be entitled to retain the money paid. On the face of it, it is a little difficult to see what ground there is on which this court can interfere. To entitle a plaintiff to relief from a penalty, it is necessary, in my judgment, for him to show that A there is some ground or another on which it would be unconscionable for the defendants to retain the money, or the whole of the money. I confess that I find it difficult to see why, if parties enter into an agreement of this sort, it should be unconscionable on the part of the vendor, who has agreed to part with his land on agreed terms, to enforce the B contract if he so desires. There may be circumstances, no doubt, in some cases, in which the court would take the view that it was unconscionable, and that the plaintiff was accordingly entitled to relief, but, unless I can be satisfied in this case that there is something unconscionable in what the defendants seek to do, I have no jurisdiction C to grant any relief whatsoever.

Taking the present case, it is no ground for giving relief to a person from the effect of the contract which he himself has made to say that he has, through no fault of the defendant whatsoever, found himself in difficulties, or that it may turn out to be not a good bargain from his D point of view. Considerations of that sort are wholly irrelevant. It matters not, so long as nothing has been done which can be said to be the fault of the defendant. The mere fact that the plaintiff finds himself in difficulties is in itself no ground for invoking the assistance of equity. He must have known when he entered into it that, if he found himself E for any reason in the unfortunate position in which he was in 1931, he would lose the money which he had already paid. Both sides must have realised that, and must have intended that result. How can it be said that, because that event has happened, it is unconscionable for the defendants to retain the money ? I know of no case in which such F a claim has been successfully made, with the possible exception of one case to which I must refer in a moment. There are cases in which there has been failure to pay instalments or to complete the contract, or where there has been some breach of some term of the contract, and the plaintiff then comes forward and says, " I am here and now ready G and willing to complete the contract, and to pay the price stipulated by the contract, and to carry out the terms of the contract," and then the court has said that it is inequitable and against conscience that the defendant should refuse to complete the contract and retain the money which has been paid. The courts say that that is not conscionable. H They say that, since the contract is to be performed, it is unconscionable to make the plaintiff pay over again the whole of the purchase price stipulated by the agreement, but the defendant is bound to treat the money which has already been paid as part-payment of the purchase price. No doubt the effect of that is, in a sense, that a new contract is created, but the courts have said that justice can be done, and that the fair equity between the parties in such a case is that the original contract, or a new contract on the terms of the old contract, shall be completed, and that it is right for the vendor to give credit for the money which he has already received. Whether such a course should be adopted where the plaintiff has stood by for a long period, whether from his own fault or not, and has then come forward and claimed A specific performance, and claimed to treat the money paid as having been paid on account, is a wholly different matter. It would depend very largely, I think, on whether there had been any change of circumstances, whether it would be hard on the defendant to force him at that stage to do so, and various matters of that kind, but the cases in which—with B the exception of one to which I am proposing to refer—that course has been adopted have been cases where the court has been able to decree specific performance, and where it has said that there must be relief against the original term of the contract which made the money paid the money of the vendor. With the exception of those cases, and the C one to which I am going to refer, I know of no case in which the court has relieved against what I am going to call a penalty, in the case of a sale of land where there is an express stipulation in the contract that the money is to be retained by the vendor in the event of the purchaser failing to complete the contract. I certainly do not intend to create a D precedent for such a relief, because, as I have already pointed out, I myself am wholly unable to see what equity there is in favour of a plaintiff who has in fact, whatever the reason, failed to complete his contract. He has entered into the contract with his eyes open, knowing what he was doing, and he now seeks relief, although he is no longer in a position E to complete the contract and to carry out his bargain.

The only case to which I have been referred in which what was called compensation has been given where there has not been specific performance decreed is *Steedman* v. *Drinkle* (2). In that case, it was a term of the contract that the money should be paid on certain dates, and time F was made of the essence of the contract. The appellant failed to carry out the terms of his contract, and the vendor sought to retain the money. The appellant began an action in Canada seeking relief. The trial judge, NEWLANDS, J., held that, time being of the essence, he could not grant relief against the forfeiture, but he was prepared to allow an G amendment of the statement of claim so as to relieve against forfeiture of the amount paid. The respondents refused that offer, and appealed. In the Supreme Court, reversing that decision, it was held that the court had jurisdiction to grant specific performance, which they decreed accordingly, on payment of the amount due to the appellant. H The matter then came before the Privy Council, and the Board took the view that, the parties having made time of the essence of the contract, specific performance could not be decreed, but that the forfeiture of the money paid was a penalty from which relief could be granted on proper terms. What the terms should be, or in what circumstances there should be such relief, does not appear, because the Board gave the respondents liberty to apply to the court of first instance, and it was for that court to determine what relief, if any, should be decreed. I think, however—I say it with the utmost respect—that that case really turns on the particular circumstances there existing. I think that the Board treated the matter as though the appellant were ready and willing to perform the contract and the respondents were refusing to permit specific performance, and the court itself was unable to decree specific performance because of the terms of the contract. The Board took the view, as I understand it, that, since the respondents might have waived the term about time being of the essence of the contract, and might have agreed that the contract should be specifically performed, and as they were not willing to accept that position, but were resisting specific performance, and insisting on their right to retain the money, it was a case in which relief should be given to the appellant, the extent of such relief being a matter to be determined by the court of first instance. In my judgment, the whole basis of that decision turns on the fact that the appellant was willing to perform the contract, and the only reason why performance was impossible was that the respondents refused to agree to specific performance, and the terms of the contract made it impossible for the court to decree specific performance. The Board thereupon thought that it was unconscionable for the respondents to take up the attitude of saying, "We will not complete, but we will retain the money," and on that ground the Board granted relief.

If that be the true explanation, that case has no possible application here, because it is obviously quite impossible for the plaintiff to suggest that there can be any sort of ground for asking for specific performance now, this action having been brought after so many years have elapsed. Quite obviously, it is no sort of question of specific performance. The fact that the delay has been due to the plaintiff's misfortune matters not, for this purpose, and obviously it is a case in which it is altogether out of the question. Apart from any of the special terms of the contract, the mere delay, which is due wholly to the plaintiff, renders it quite impossible for the court to consider specific performance, even if the plaintiff asked for it. The plaintiff has chosen to stand by for all these years, and has not made the smallest attempt to complete the contract, and, in those circumstances, for myself, I am wholly unable to see any ground on which the plaintiff can say that it is unconscionable for the defendants to retain possession of the money which he agreed by contract that they should have in the events which have happened. But, assuming for a moment that this was a case in which I thought it might be possible to give compensation, there is another reason, in my judgment, which makes any question of the sort absolutely impossible. One of the terms of the contract was that, when a certain sum of money had been paid, a portion of the property would be conveyed to the plaintiff or to his nominees. The money was paid, and the property was conveyed to the nominees of the plaintiff, and the contract to that extent has been performed. In my judgment, it is impossible, having regard to those circumstances, for the plaintiff to come and say: "Now I have got, at any rate, a part of what I bargained for. On payment of £139,500 I have got the property which I wanted, but I really had to pay too much for that, because I had to pay £40,200 beyond the true price as shown in the schedule, and therefore I am entitled to have it back." That is really saying, "I have made a bad bargain. Please let me off my bargain," which, of course, is the sort of claim that a court never for a moment entertains.

I wholly fail to appreciate how it can even be suggested in this case that there is any ground for relief. The plaintiff has got a part, at any rate, of what he bargained for, and he has not got the rest because he could not complete the contract. In my judgment, the defendants are doing nothing which is against conscience, nor anything which they are not entitled, both in law and in equity to do. In all the circumstances, the plaintiff should have no relief, and the defendants are entitled to retain the money which they have received from the plaintiff under the express terms of the contract. In these circumstances, this action fails, and I dismiss it with costs.

Action dismissed with costs.

Solicitors: *Linklaters & Paines* (for the plaintiff); *Bischoff, Coxe, Bischoff & Thompson* (for the defendant company).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

R. *v.* WEST MONMOUTHSHIRE OMNIBUS BOARD, *Ex parte* PRICE.

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 13, 1938.**]

Local Government—Omnibus board constituted by local statute—Whether board a local authority—Provisions relating to accounts of local authority incorporated in local statute—Repeal of provisions of 1894 *Act—Effect on local Act—Whether elector entitled to inspection of auditor's report on accounts of board—Interpretation of statutes—Local Government Act,* 1894 (*c.* 73), *s.* 58*—Local Government Act,* 1933 (*c.* 51), *s.* 283 (4).

A board to provide and run omnibuses was constituted by a local Act which incorporated the enactments relating to audit of accounts and the incidental and consequential effects of audit. At the time the local Act was passed these provisions were contained in the Local Government Act, 1894 s. 94. Later, the 1894 Act was repealed, and in 1933 a Local Government Act was passed, of which sect. 283 (4) provided that the accounts of a local authority, and the auditor's report thereon, should be open to the inspection of any local government elector. The applicant, as a local government elector, contended that he was entitled to such inspection, on the ground that the repeal of the 1894 Act did not affect the provision of the 1894 Act incorporated in the local Act, which had not been repealed, and that the provisions of sect. 283 (4) of the Act of 1933 were now incorporated in the local Act:—

Held: (i) the applicant was entitled to the inspection claimed.

(ii) in the circumstances, whether or not the board was a local authority, the inspection of the accounts of the board was governed by the Act of 1933, which was now the enactment relating to the audit of accounts and the incidental and consequential effects of audit.

[**EDITORIAL NOTE.** The question here is in substance whether a board, consisting of representatives of two or more local authorities, is itself a local authority within the meaning of that word as used in the Local Government Act, 1933, s. 283 (4). It is admitted that the board would not be a local authority within the general definition of that term in the Local Government Act, 1933, but it is held that it is a local authority for the purpose of the inspection of its financial documents, having regard to the terms used in the local Act by which the enactments relating to audit were incorporated therein. The decision is of importance, as many boards now consist of constituent local authorities, and this decision confirms the right of the ratepayers within the district of any one of these constituent authorities to inspect the accounts of such a board.

AS TO INSPECTION OF LOCAL AUTHORITY'S ACCOUNTS, see HALSBURY, Hailsham Edn., Vol. 21, p. 226, para. 417; and FOR CASES, see DIGEST, Supp., Local Government, No. 84a.]

APPLICATION to make absolute a rule *nisi* for a writ of *mandamus* directed to the West Monmouthshire Omnibus Board commanding them to allow Walter Price, the applicant for the rule, to inspect the district auditor's report on the accounts of the board for the year ended Mar. 31, 1936. The facts and the arguments are set out in the judgments.

R. M. Montgomery, K.C., and *G. D. Squibb* showed cause.

W. N. Stable, K.C., and *Leslie David* in support of the rule.

LORD HEWART, L.C.J.: The ground of the rule in this case is that the omnibus board is a local authority, and that the prosecutor, as a ratepayer and local government elector, is entitled to see the report referred to. An additional ground is contained in the rule, which says that the omnibus board is under a statutory obligation to disclose the district auditor's report to the prosecutor. It is quite plain, from the affidavits and the correspondence which have been read to the court, that the applicant for this rule applied for and was refused inspection of the district auditor's report named in the rule. The question is whether an order ought to be made that that report shall be disclosed to him. In other words, is it clear that he is entitled to the inspection which he claims?

The history of the matter was made very clear in the course of the argument. By a local Act called the Mynyddislwyn Urban District Council Act, 1926, there was constituted, among other things, a board which was to provide and run omnibuses in certain districts and subject to certain conditions. That board consisted of entities called the constituent authorities, and provision was made in detail for the constitution of the board. By sect. 94 of the local Act it is provided that the provisions of the Local Government Act, 1894, s. 58, should apply to the accounts of the board and of their committees and officers, and to the audit thereof, and provision was made for the making up of those accounts. When one turns to the Local Government Act, 1894, s. 58, one finds, among other things, this provision in subsection (2):

> The said accounts [the accounts of the receipts and payments of parish and district councils and of parish meetings] shall, except in the case of accounts audited by the auditors of a borough (but inclusive of the accounts of a joint committee appointed by a borough council with another council not being a borough council) be audited by a district auditor, and the enactments relating to audit by district auditors of accounts of urban sanitary authorities and their officers, and to all matters incidental thereto and consequential thereon, shall apply accordingly [with the exception of an immaterial exception].

That being so, so long as the Local Government Act, 1894, remained in force, the effect was that, by the operation of sect. 94 of the local Act the accounts of this board, notwithstanding that in the strict sense of the term they failed to fulfil the definition of a local authority, were subject to those provisions with regard to audit, and the incidental and consequential effects of audit. These words of sect. 58 (2) became, as Mr. Stable has argued, as if they were written into the appropriate part of the local Act of 1926. Afterwards, however, as the result of further legislation, the Local Government Act, 1894, *eo nomine*, ceased to have effect, but Mr. Stable contends that that fact had no relation to the validity of its provisions so far as they had been incorporated in the private Act, which, in its turn, had not been repealed. In other words, the repeal of the public statute as a public statute did not diminish the effect of those provisions contained in it which the local Act had incorporated within itself. If that argument is right, it follows that to-day, when a person looks to see what are the enactments relating to audit by district auditors of accounts of urban sanitary authorities and their officers, and all matters "incidental thereto and consequential thereon," he is not committed to the actual provisions of the law as it stood in the year 1926. He is entitled to see what are the contemporary provisions which are so afforded. He therefore looks to the statute of 1933, the Local Government Act, 1933, and, amongst other things, he finds a provision, by sect. 283 (4):

> The abstract of the accounts of a local authority and of the treasurer of a local authority, and any report made by an auditor on those accounts, shall be open to the inspection of any local government elector for the area of the authority, and any such local government elector may make a copy thereof or an extract therefrom, and copies thereof shall be delivered to any such local government elector on payment of a reasonable sum for each copy.

It is quite true, as Mr. Montgomery has observed, that the term "local authority" is, by the Local Government Act, 1933, s. 305, really defined. The expression means:

> the council of a county, county borough, county district or rural parish.

It would be idle to contend, nor does anybody contend, that this omnibus board, constituted under the local Act of 1926, satisfies that definition. On the other hand, however, it is urged that, even if this body does not fall within the definition of "local authority," so far as the inspection of its financial documents is concerned, it is governed by the provisions of the Local Government Act, 1933, s. 283, which *mutatis mutandis* are brought into the local Act by the combined operation of the Act of 1894 and the Act of 1933.

The court has been invited to hold that no such conclusion is possible or reasonable, inasmuch as there are difficulties in saying, for example,
A what the area of the authority in such a case would prove to be, and who the electors might turn out to be. The neat answer was given to that objection when it was pointed out by Mr. Stable that, by sect. 92 of the local Act of 1926, in certain events it is provided that a deficiency in the revenue of the omnibus board must be made good by the constituent
B authorities, who for that purpose are entitled, in the case of need, to levy a rate upon the persons in the district of the constituent authority. Mr. Stable says, and says, I think, with force, that it is no more difficult to find out who are the persons entitled to discovery of documents because they belong to the area of a certain authority than it is to find out who are
C the people liable to a rate because they are within the area of a certain authority. In my opinion, the argument which has been made in support of this rule is clear and conclusive, and I think, therefore, that this rule *nisi* should be made absolute.

D BRANSON, J.: I agree, and I would add only a word or two with reference to the argument which was based upon the Interpretation Act, 1889. It was urged upon us that sect. 38 of that Act, coupled with the provisions of sect. 39, showing that the expression "Act" includes a local and personal Act and a private Act, had the effect of abolishing
E the operative force of the Local Government Act, 1894, s. 58, and counsel went on to contend that there was nothing in the Local Government Act, 1933, which could be construed as taking its place in the direction of imposing upon this omnibus board the duty of disclosing their accounts. It seems to me that that argument involves a fallacy. The Interpretation
F Act, 1889, s. 38, applies only to cases where an Act has been repealed, or where provisions of an Act have been repealed and been re-enacted. It is incontestable that the Local Government Act, 1894, s. 58, was given force and effect by sect. 94 of the local Act of 1926, and that, so long as the Local Government Act, 1894, stood unrepealed, those provisions were
G of full force and effect. If it be true to say that the repeal of the Local Government Act has repealed that sect. 58 in so far as it was given effect by sect. 94 of the Act of 1926 and nothing has been put in its place, then the Interpretation Act does not apply to it, because it has not been re-enacted. If, on the other hand, the provisions of sect. 58 as applied
H to the Act of 1926 by sect. 94 thereof have been re-enacted by the Local Government Act, 1933, then one can guess their meaning just as well by looking at sect. 58 as by looking at sect. 283 of the Act of 1933. In either event, it seems to me that the same result follows, that this omnibus board, though it is not within the definition of a local authority, and never was, is by sect. 94 of the private Act made subject to the liabilities of a

local authority in relation to the production of its accounts. For those reasons I agree with the result arrived at by LORD HEWART, L.C.J.

HUMPHREYS, J.: I also agree.

Rule made absolute.

Solicitors: *Gibson & Weldon*, agents for *Trevor C. Griffiths*, Blackwood A (for the omnibus board); *Gregory, Rowcliffe & Co.*, agents for *Norman A. Morgan & Co.*, Cardiff (for the applicant).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

B

SALVALENE LUBRICANTS, LTD. *v.* DARBY.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **January 11, 1938.**]

Practice—Action for slander—Second defendant added when action part heard without a jury—Application by second defendant for a jury—Administration of Justice (Miscellaneous Provisions) Act, 1933 (*c.* 36) *s.* 6—*R.S.C., Ord.* 36, *r.* 1. C

When an action for slander was part heard without a jury, a second defendant, who was a partner of the first defendant, was added. The judge, who had partly heard the case, made an order that the case should be D further heard before him without a jury after the necessary amended pleadings had been delivered. The second defendant applied for a jury. It was contended by the plaintiff that, by R.S.C., Ord. 36, r. 1, a jury must be asked for not later than four days after notice of trial has been given. It was admitted that no notice of trial had been given to the second defendant, but it was suggested that, as he had acted upon the order for directions, he had adopted it, and thereby waived E any notice of trial:—

HELD: as the second defendant had never been given any notice of trial, it could not be said that the application for a jury had been made more than four days after notice of trial had been delivered. The defendant was therefore entitled to a jury.

[**EDITORIAL NOTE.** The latest time for applying for a jury is, under R.S.C., F Ord. 36, r. 1, 4 days after notice of trial. Where a defendant is added after notice of trial has been given, he still has a right to ask for a jury, since so far as the added party is concerned no notice of trial has been delivered.

AS TO RIGHT TO JURY, see HALSBURY, Hailsham Edn., Vol. 26, p. 88, para. 159; and FOR CASES, see DIGEST, Practice, Nos. 2034-2036. See YEARLY SUPREME COURT PRACTICE, 1938, p. 579.] G

APPEAL from an order of TUCKER, J., dated Nov. 18, 1937.

The plaintiff had brought an action for slander against P. H. Darby. In the course of the trial of the action before TUCKER, J., without a jury, it was discovered that the words complained of had in fact been H uttered, not by P. H. Darby, but by H. H. Darby, his partner. On Nov. 18, 1937, TUCKER, J., made an order giving the plaintiff leave to add H. H. Darby as a defendant, and further ordering that the trial should be before himself without a jury. The second defendant applied *ex parte* by motion to the Court of Appeal for leave to appeal against this order, and, by consent, the application was treated as the hearing of the appeal.

Charles Doughty, K.C., and *Elliot Gorst* for the appellant.

J. P. Eddy, K.C., and *Sir George Jones* for the respondent.

Doughty, K.C.: The first defendant had a perfect defence, and so no jury was asked for. But the second defendant is asking for a jury, to which any defendant in a slander action is entitled. It is a personal right.

Eddy, K.C.: This action is part heard, and a jury cannot now be ordered. By the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6, any application for a jury must be made before trial. By R.S.C., Ord. 36, r. 1, such an application must be made not later than four days after notice of trial has been given. It is admitted that no notice of trial was given to the second defendant, but the order for directions, dated Nov. 18, 1937, has been acted upon by him, and he has adopted it. It was a consent order to a trial by judge alone. A judge always has the power to dispense with any notice of trial, and in this case notice of trial was waived. The second defendant did not need it, as he was present in court at the time the order was made. The first defendant had implied authority to bind his partner.

The judgment of the court was delivered by GREER, L.J.

GREER, L.J.: There can be no doubt about this matter. By reason of the Law Reform (Miscellaneous Provisions) Act, 1933, s. 6, a defendant in a slander action is entitled to have it tried by a jury. It is alleged, however, that he must make his application in due time, and in support of that Mr. Eddy has called our attention to R.S.C., Ord. 36, r. 1. In my judgment, that has nothing to do with this matter. This present application was for leave to appeal, but both parties have agreed to treat it as the appeal. Under R.S.C., Ord. 36, r. 1, a summons must be taken out under Ord. 14, or else an application for a jury must be made not later than four days after the notice of trial has been delivered. So far as this defendant is concerned, there has never been any notice of trial, either by an express order dispensing with it or by notice of trial being delivered, and it is therefore impossible to say that this application was made later than four days after the notice of trial was delivered. Therefore it is quite clear that the judge ought to have made the order sought. We are told that the only reason he did not make it was the difficulty of retaining the case before him if it was to be heard with a jury. That is not a sufficient reason. This defendant was not before him at the time, and this order ought not to have been made. This defendant can say: I was not a party to that order, and I am entitled to a jury.

For these reasons, I think that this appeal must be allowed. Fortunately the present position is such that TUCKER, J., can take this case with a jury tomorrow. If that is not possible, the case must stand over. It is of importance that it should be tried by him.

Appeal allowed with costs.

Solicitors: *R. J. Clark* (for the appellant); *Cameron, Kemm & Co.* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

PHILLIPS *v.* A. LLOYD & SONS, LTD.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **January 12, 13, 1938.**]

Practice—Action for damages for negligence and breach of statutory duty—Serious personal injuries alleged—Questions of law raised in defence—Application to remit action to county court.

The infant plaintiff in an action for damages for negligence and breach of statutory duty had suffered serious injuries which permanently affected her earning capacity. The defendants pleaded contributory negligence. On application to a judge, it was ordered that the case be remitted to the county court. The plaintiff appealed:—

HELD: this being a case in which difficult questions of law might arise, and one in which the judge had not given sufficient weight to the consideration of the amount of the plaintiff's injury, it was one which should be tried in the High Court. In such circumstances, the Court of Appeal has power to reverse the decision of the judge, although the judge's power to remit to the county court is a discretionary one.

Culver v. *Beard* (1) and *Stevens* v. *Walker* (2) *considered.* *Evans* v. *Bartlam* (3) *applied.*

[EDITORIAL NOTE. It has been felt that there is some conflict between the decisions in *Stevens* v. *Walker* (2) and *Culver* v. *Beard* (1), both of which are decisions of the Court of Appeal, but of different branches thereof. The decision in the matter is made easier by the passage in the opinion of LORD ATKIN in the decision of the House of Lords in *Evans* v. *Bartlam* (3), where he says, at p. 650, speaking of the power of the Court of Appeal to interfere with the exercise of the discretion by a lower tribunal: "if it sees that, on other grounds [that is, otherwise than on grounds of law], the decision will result in injustice being done, it has both the power and the duty to remedy it."

AS TO REMISSION OF ACTIONS OF TORT TO THE COUNTY COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 181, 182, paras. 284, 285; and FOR CASES, see DIGEST, Vol. 13, pp. 484, 485, Nos. 340-352. See also NEW COUNTY COURT PRACTICE, 1938, pp. 45-47.]

Cases referred to:

(1) *Culver* v. *Beard*, [1937] 1 All E.R. 301; Digest Supp.

(2) *Stevens* v. *Walker*, [1936] 2 K.B. 215; [1936] 1 All E.R. 892; Digest Supp.; 154 L.T. 550.

(3) *Evans* v. *Bartlam*, [1937] A. C. 473; [1937] 2 All E.R. 646; Digest Supp.: 106 L.J.K.B. 568; 157 L.T. 311.

APPEAL from an order of PORTER, J., dated Dec. 7, 1937. The facts are set out in the judgments.

Hector Hughes, K.C., and *Michael O'Sullivan* for the appellant.

Gilbert J. Paull for the respondents.

O'Sullivan : The injuries here are of a serious nature, and will permanently affect the plaintiff's earning capacity. Further, the defence raises difficult questions of law. It is submitted that this case ought to be tried in the High Court, and that the judge did not give sufficient weight to these considerations.

Paull : The injuries in this case are not of such a type as to deprive the judge of his discretion. The judge used his discretion, and this court should not disturb it. To do so would be to import into the County Courts Act, 1919, the words " except in cases of permanent incapacity." It is submitted that the cases of *Culver* v. *Beard* (1) and *Stevens* v. *Walker* (2) are not inconsistent. [Counsel also referred to *Evans* v. *Bartlam* (3).]

GREER, L.J. : In this case, the question arises whether sufficient material was before the judge, and adequately considered by the judge, when he dealt with the question which *prima facie* was within his discretion. In the course of the judgment in *Culver* v. *Beard* (1), to which our attention has been called in a vigorous argument by Mr. Paull, I expressed the view that in all these cases the discretion was left by statute to the judge in chambers, and that the court had no power to interfere with that discretion. The matter was considered in a case which came before the other branch of the court, *Stevens* v. *Walker* (2), and, after consideration, the members of this court had a consultation, as a result of which it was determined that both branches of the court should act upon the same principle—namely, upon the principle of which *Stevens* v. *Walker* (2) is an example—that, where the court comes to the conclusion that the judge has not given adequate weight to the considerations that ought to weigh with him, then the court may exercise their own discretion, and may reverse the order made by the judge.

That, I think, is emphasised by the decision of the House of Lords in the case to which SCOTT, L.J., referred, *Evans* v. *Bartlam* (3). I need not read the passages which have already been read, but I think that they amount to the view that the judge, who came to the conclusion that my view was right upon the facts of that particular case, also quite definitely and without hesitation came to the conclusion that the reasons which I had given, which were based upon the same reasons as those which I gave in *Culver* v. *Beard* (1), were not to be followed.

In those circumstances, I think that it is clear that in this case we are entitled to come to the conclusion that the judge had not adequately considered the seriousness and the importance of the claim for damages, and that I regard my decision in *Culver* v. *Beard* (1) as really meaning this. In those circumstances, I find it impossible in the present case to say that, because we differ from the view which the judge took, and we do so differ, we should not therefore allow the appeal, and make an order where the statute says that the power of making the order is a power which is vested in the judge, provided that he considers all the circumstances of the case. I think that there is another reason. The judgment of Slesser, L.J., in *Culver* v. *Beard* (1) has got to be interpreted in the same way, and the words at the end of the second paragraph on p. 306 must be read in this way : " The learned judge must have sufficient regard to any matters which he ought to have regard to or ought to take into consideration matters which he ought to have taken into consideration." Then the decision of Romer, L.J., in the earlier case of *Stevens* v. *Walker* (2) shows that in his view one of the matters to be taken into consideration is whether or not questions of law which may be of some importance have to be considered, and, if we come to the conclusion, as we do, that there may be difficult questions of law involved in this case, as well as difficult questions of fact as to the amount of damage which the court should order, I think that we can come to the conclusion that we are entitled to reverse the order of the judge, having regard to the fact that he did not give sufficient weight to the consideration of the amount of injury suffered by this poor girl, and having regard also to the fact that he did not give sufficient weight to the questions of law which would necessarily arise. For those reasons, we think that this appeal should be allowed, with costs.

Slesser, L.J. : I agree. On all the three grounds which were mentioned in the case of *Stevens* v. *Walker* (2), although there may well be others, I think that the plaintiff here should be allowed to have her action brought in the High Court. The three grounds to which I refer are those mentioned by Lord Wright, M.R., and Romer, L.J., in *Stevens* v. *Walker* (2) : (i) that it appears that the damage which may be claimed may be of a considerable amount ; (ii) that there is a probability that the defendants will not have a substantial defence ; and (iii) that, if the defendants have got a substantial defence, that defence will almost of necessity involve difficult questions of law.

As to the first point, it is conceded that this unfortunate girl lost the whole of the thumb on her right hand, a disability which is certainly likely to render her at any rate very seriously prejudiced as a wage-earner for the whole of her life. As to the second question, with regard to the possibility of a substantial defence, an affidavit has been sworn in this case to the effect that, the defendants being charged with a breach of statutory duty under the Factory Acts, the defendants in the police court have already been fined and convicted for that breach. That, of course, is possibly not evidence at all, certainly not conclusive evidence at the trial, but, in considering whether there is a probability of a defence on the point that no such breach was committed, it is material to notice that that affidavit has not been contradicted. If a breach has been so committed, or has probably been committed, we come to the third point. The third point is raised by Mr. Paull, who says that, if the defendants were negligent or committed any breach of statutory duty, the infant plaintiff was guilty of contributory negligence. Nobody knows better than does Mr. Paull that that raises, in the present state of the authorities, a difficult question of law, and, as LORD ROMER has stated in *Stevens* v. *Walker* (2), and as I ventured to say in the case of *Culver* v. *Beard* (1), which has already been cited to us, one of the reasons for keeping the case in the High Court may be because of the difficult legal problems involved A in the case.

For all these reasons, I agree with GREER, L.J., and would add only that I also wish to associate myself with him when he says that, in dealing with these cases, this court will now find it is bound by the decision in *Stevens* v. *Walker* (2) rather than by that in *Culver* v. *Beard* (1), where B there is any discrepancy between them, and that *Evans* v. *Bartlam* (3) has assisted us to come to a conclusion at which we had already arrived—namely, that the discretion which the judge has is of a nature cognisable in this case, as stated by LORD ATKIN in *Evans* v. *Bartlam* (3).

C SCOTT, L.J.: I agree with both judgments which have been given, and with the reasoning of each of them. I should just like to add a word or two on the facts of the case. The stepfather, who is the person appearing on behalf of the infant plaintiff as next friend, says in his affidavit:

> that the injuries to my step-daughter are of a serious nature involving the amputation D of the thumb of the right hand at its junction with the palm of the hand. My step-daughter is right-handed, and I am informed by her and I verily believe that she is now an odd lot in the labour market, and her earning capacity is permanently and considerably reduced. In my respectful submission my case is one more fit to be tried in the High Court than the county court and one fit to be tried by a jury.

E Then the doctors who examined her give evidence. Dr. Cecil Malley, who is a Fellow of the Royal College of Surgeons, says:

> This girl has lost the greater part of her right thumb. The wounds on her hand have healed, however the scars are still very tender. It is possible that she may need a re-amputation if this tenderness does not disappear. She will be left with a permanent weak hand.

F Then Dr. J. I. O'Sullivan, who is a Bachelor of Medicine, says:

> The effect of the amputation is twofold. It impairs the use of the hand considerably, so as to render her unfit for most forms of manual work, especially for finer work requiring the use of the finger tips and thumb, and, even for such work as she can do, she will be slower, clumsier, and less efficient than a normal person, while, if observed by a prospective employer (and in most factories, etc., nowadays G inspection of the hands is carried out), it is sufficient to cause her rejection. It gives rise, from the mutilated appearance of the hand, to a considerable degree of permanent disfigurement.

It is quite clear that she is injured seriously in the labour market, and, if one may take a human view, is also probably injured as a prospective H housewife.

Those facts in this case are such as to make the case a suitable one for the High Court, unless there are other reasons (which, in my opinion, are not present here) for saying that the case ought to go to the county court. There may be exceptional cases where the case ought to go to the county court. I cannot conceive it for the moment, but I keep that open, in case on some future occasion some such case may be brought before us.

Appeal allowed with costs.

Solicitors: *Churchill & Co.* (for the appellant); *James Turner & Son* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re BRITISH GAMES, LTD.

[CHANCERY DIVISION (Simonds, J.), **November 15, 16, 1937.**]

Moneylending—Memorandum—Loan to company—Signature to memorandum—Sufficiency of memorandum—Sufficiency of affidavit of proof—Moneylenders Act, 1927 (*c.* 21), *ss.* 6, 9—*Companies Act*, 1929 (*c.* 23), *s.* 29.

A memorandum of a moneylending transaction stated that the borrowers were taking up an advance of £4,950, and that they were giving a promissory note for that amount bearing interest at 27½ per cent. per annum, payable by instalments, and then authorised and requested the borrowers to retain the £4,950 in payment of the outstanding balances then owing to them. That document was signed by a director and the secretary of the borrowing company for and on behalf of the company. Some payments were made, but later the company went into liquidation, and the moneylenders lodged a proof of the outstanding amount. The proof was accompanied by an affidavit, which in its turn was accompanied by a statement showing the sums actually lent, the dates on which they were lent, and the amount of every repayment made. The liquidator rejected such proof, on the ground that it was not signed personally by the borrower, as required by the Moneylenders Act, 1927, s. 6 (1):—

HELD: (i) it is not required by the Companies Act, 1929, s. 29, read with the Moneylenders Act, 1927, s. 6 (1), that the memorandum of a moneylending transaction shall be under the seal of the company, and the signatures of officials for and on behalf of the company were a sufficient compliance with the statutory provisions.

(ii) the reference in the memorandum to outstanding balances was sufficient to satisfy the requirements of the Moneylenders Act, 1927, s. 6 (2), that it shall contain all the terms of the contract.

(iii) the affidavit lodged with the proof, accompanied, as it was, by the statement of account, was sufficient within the Moneylenders Act, 1927, s. 9 (2) (*a*).

[**EDITORIAL NOTE.** This case considers the application of the words "signed personally by the borrower," which occur in the Moneylenders Act, 1927, s. 6 (1), to the case of a memorandum of a loan to a company. It is decided that such a memorandum does not require the seal of the company to be affixed thereto, but that it is sufficiently executed if it is signed by the usual officials of the company for and on behalf of the company. The case also considers the requirements of sect. 9 (2) (*a*) of the 1927 Act, which deals with the affidavit verifying the debt.

AS TO SIGNATURE TO MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 23, p. 190, para. 280; and FOR CASES, see DIGEST, Supp., Money and Moneylending, Nos. 353 a-353 y.]

Cases referred to:

(1) *B. S. Lyle, Ltd.* v. *Chappell*, [1932] 1 K.B. 691; Digest Supp.; 101 L.J.K.B. 185.

(2) *B. S. Lyle, Ltd.* v. *Cassel* (1935), May 23, Unreported.

(3) *Dunn Trust, Ltd.* v. *Feetham*, [1936] 1 K.B. 22 ; Digest Supp. ; 105 L.J.K.B. 52 ; 154 L.T. 53.

APPLICATION by General and Industrial Finance, Ltd., registered moneylenders, for an order that the rejection of their proof for £4,804 19*s*. 8*d*., money lent, was wrong in law, and should be reversed.

H. E. Salt for the applicants.

Leonard Stone for the liquidator.

SIMONDS, J. : The applicants, a company called General & Industrial Finance, Ltd., carrying on the business of licensed moneylenders, lent money to the company by means of a transaction to which I shall presently refer in detail. On the liquidation of the company, they lodged their proof on Apr. 1, 1937, claiming a sum due of £4,950, less certain payments, which had been made on account, bringing that sum down to £4,688 9*s*. 2*d*., together with interest from Jan. 6, 1937, to Feb. 8, 1937, making an aggregate of £4,804 19*s*. 8*d*. That claim was rejected by the liquidator on Aug. 13, 1937, on the ground that the contract of Dec. 1, 1936 (to which I shall presently refer), made between the applicants and the company in liquidation, was not signed personally by the company, in accordance with the provisions of the Moneylenders Act, 1927, s. 6 (1). When the matter came before the court, that ground of rejection was supplemented by other grounds which have been fully argued before me : (*a*) that the memorandum of Dec. 1, 1936, does not contain all the terms of the contract in accordance with the Moneylenders Act, 1927, s. 6 (2) ; and (*b*) that the provisions of sect. 9 (2) (*a*) of the Act have not been complied with.

The transaction was embodied in and evidenced by a document, the memorandum of contract, dated Dec. 1, 1936. It is addressed to the applicants, the moneylenders, and is in these terms :

> Dear Sirs, We beg to confirm that we are quite agreeable to taking up an advance of £4,950 from you on Dec. 1, 1936, and in exchange signing a promissory note for £4,950 bearing interest at the rate of 27½ per cent. per annum, repayable to you at Marcol House, 293, Regent Street, London, W.1, or any other address that may be directed, by one instalment of £50 on Dec. 3, 1936, and then by the following instalments [the instalments, are set out]. and the balance of £2,980, together with the accrued interest calculated at 27½ per cent. per annum, to become due and payable on Feb. 1, 1937, and if we make default in payment of any instalment on its due date we agree that the whole of the outstanding principal shall thereupon become due and payable together with interest thereon at the rate of 27½ per cent. per annum.

Then come these words, which, in the view which the authorities bind me to take, are of vital importance :

> We authorise and request you to retain the said sum of £4,950 the proceeds of this transaction in payment of the outstanding balances of our accounts which are owing to you. We agree to lodge with you post-dated cheques relative to this transaction.

That document is signed "for and on behalf of British Games, Ltd.," by a director, Edgar Jay, and the secretary, G. N. Rainnie. There is no doubt that these two men were a director and the secretary of the company, respectively, at the relevant dates. The promissory note referred to in that memorandum is bound up with it. It is a promissory note which conforms in all respects with the terms stated in the memorandum, and it is signed "for and on behalf of" the company by the same persons.

The memorandum having been duly signed, and the promissory note duly given, some payments were made in accordance with their terms, but at a date in January default was made. Proceedings were taken to recover judgment, but they were not completed, and the result was that the applicants lodged their proof as creditors in respect of what was due to them under this document. The first ground of objection, as I have said, was that the memorandum did not satisfy the conditions of the Moneylenders Act, 1927, s. 6 (1). That provides, so far as it is relevant for the purpose of this decision, as follows:

> No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower. . . .

The question is: What is the meaning of those words in relation to a contract of moneylending entered into by a limited company under the memorandum? It is argued on behalf of the company that the provisions of that section are not complied with unless the memorandum has been sealed by the borrowing company. On the other hand, it is argued that the provisions of the section are sufficiently satisfied if the memorandum is signed by the proper officers of the borrowing company, persons duly authorized thereunto. It appears to me that for this purpose I must have regard to the provisions of the Companies Act, 1929. Sect. 29 (1) of that Act (which was passed two years after the Moneylenders Act, 1927, and which itself embodied the language of the earlier Companies Act, 1908, s. 76) provided, in relation to the form of contracts of a limited company incorporated under the Act, that:

> Contracts on behalf of a company may be made as follows: (*a*) A contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company.

That subsection does not apply to this case, because there is nothing which prescribes that a moneylending transaction must be perfected by a memorandum made under seal. Subsection (*b*) provides:

> A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied.

It appears to me that this is exactly such a contract. Here the contract, to satisfy the provisions of the Moneylenders Act, must be signed personally by the person charged therewith. Accordingly, if it is to be made by a company, the contract may be signed by a person acting under the authority of the company, express or implied, and sect. 29 (2) of the Act states:

> A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.

Accordingly, reading, as I must read, the provisions of the Companies Act, 1929, s. 29, into the law relating to moneylenders, I find that the provisions of the Moneylenders Act, 1927, s. 6, are, in the case of a limited company, satisfied if the memorandum referred to in that section is signed by the persons who are officials of the company and authorised to sign on its behalf. I see no necessity for importing into the provisions of the Moneylenders Act, 1927, the provisions of art. 76 of Table A under the old Act of 1908, or any provision of Table A under the new Act, so as to make it incumbent on a company borrowing money to affix its seal to the memorandum which is contemplated by sect. 6 of the Moneylenders Act. Therefore, so far as that ground of rejection goes, I must reverse the decision of the liquidator.

There then come for consideration the other matters which were not brought to the attention of the liquidator, but which have been argued before me. The first point rests on the Moneylenders Act, 1927, s. 6 (2), which provides:

> The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act.

Sect. 9 (2) provides:

> No proof of a debt due to a moneylender in respect of a loan made by him shall be admitted for any of the purposes of the Bankruptcy Act, 1914, unless the affidavit verifying the debt is accompanied by a statement showing in detail: (*a*) the amount of the sums actually lent to the debtor and the dates on which they were lent, and the amount of every payment already received by the moneylender in respect of the loan and the date on which every such payment was made.

It is argued on behalf of the liquidator that the memorandum which I have read does not comply with the provisions of sect. 6 (2), because it does not contain all the terms of the contract, and that the proof does not comply with the provisions of sect. 9, because there is no statement accompanying the affidavit showing the amount of the sums actually lent to the debtor. As I understand it, the ground of that objection is that it does not sufficiently appear on the face of the document, or in the proof, that this is in substance a consolidating loan, or, perhaps, I should say, the last of a series of documents, recording continuous transactions between the parties, and does not, in particular, reveal that, of the sum of £4,950, some part at least, on an analysis, is proved to be owing in respect of interest which had accrued due on previous loans. It seems to me that—consistently with the decision of the Court of Appeal in *B. S. Lyle, Ltd.* v. *Chappell* (1), and with a further explanation of that case in an unreported decision of the Court of Appeal in *B. S. Lyle, Ltd.*

v. *Cassel* (2)—I must hold that this is a transaction of loan of which a sufficient memorandum has been given to satisfy the statute. I regard the words: "We authorise and request you to retain the said sum of £4,950 the proceeds of this transaction in payment of the outstanding balances of our accounts which are owing to you," as being in all respects analogous to the words which were used in *Lyle's* case (1): A

> I hereby authorise and request you to allocate the whole of the above advance of £200 in settlement of my promissory note in your favour dated Apr. 25, 1930

It seems to me impossible to distinguish between the one case and the other, and, accordingly, I must regard this as a transaction of loan in which, on Dec. 1, 1936, a sum of £4,950, no more and no less, was lent by the one party and borrowed by the other. That is the principal sum which on that day was lent and was borrowed. Accordingly, if that be true, I find in this memorandum of Dec. 1, 1936, all the necessary particulars to satisfy the provisions of the statute. B

My attention was called to a later case in the Court of Appeal, *Dunn Trust, Ltd.* v. *Feetham* (3), but, in my view, that case is widely different from the one which I have to consider, for there it plainly appeared on the face of the document, and from the facts which were given in evidence, that a sum of £50, which was purported to be lent, was not actually lent at all, and the court in that case came to the conclusion that it was interest, and not principal, and should have been so described to satisfy the provisions of sect. 15 of the Act. C D

Coming to the conclusion to which I do, on the true construction of this document, it appears to me that this objection also fails, so far as sect. 6 (2) is concerned. And, if it fails with regard to sect. 6 (2), so also must it fail with regard to sect. 9 (2) of the Act, for, in my view, the statement accompanying the affidavit does show the amount of the sums actually lent to the debtor and the dates on which they were lent, and the amount of every payment already received by the moneylender in respect thereof. Accordingly, I must allow the application, and direct that the proof of the applicants be admitted to rank for dividend against the company. E F

Application allowed.

Solicitors: *Fielder, Jones & Ball* (for the applicant); *Baileys* (for the liquidator). G

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

H

WATERHOUSE *v.* REID.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **January 11, 1938.**]

Practice—Action for fraudulent misrepresentation—Leave to serve notice of writ out of the jurisdiction—Defendant domiciled in Scotland—Whether claim for breach of warranty could be included in statement of claim—R.S.C., Ord. 11, *r.* 1 (*e*).

The plaintiff obtained leave to serve upon the defendant, who was domiciled in Scotland but resided in Iraq, notice of a writ claiming damages for fraudulent misrepresentation upon the sale of a medical practice in Sunderland. In his statement of claim, he added a claim for breach of warranty in reference to the same transaction. The defendant applied to have struck out such portions of the statement of claim as related to this claim :—

HELD : the words of R.S.C., Ord. 20, r. 4, are not so wide as to enable a plaintiff to add a claim in contract when he has obtained leave to serve out of the jurisdiction notice of a writ claiming in tort, and would not have been able to obtain leave to serve notice of a writ claiming in contract.

[**EDITORIAL NOTE.** R.S.C., Ord. 11, r. 1, contains certain restrictions upon granting leave for service of notice of writ out of the jurisdiction. One of these restrictions is that no such leave will be granted where a person domiciled in Scotland sues upon a breach of contract within the jurisdiction. The claim added in the statement of claim, and which was not disclosed to the court when leave was obtained, was therefore one in respect of which the court would not grant leave, and, in consequence, the addition to the statement of claim was struck out.

AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-33, para. 44 ; and FOR CASES, see DIGEST, Practice, pp. 336-352, Nos. 547-668. See YEARLY SUPREME COURT PRACTICE, 1938, pp. 80-97.]

Cases referred to :

(1) *Diamond* v. *Sutton* (1866), L.R. 1 Exch. 130 ; Digest, Practice, 371, *815* ; 35 L.J. Ex. 129 ; 13 L.T. 800.

(2) *Large* v. *Large*, [1877] W.N. 198 ; Digest, Pleading, 125, *1146*.

(3) *Lenders* v. *Anderson* (1883), 12 Q.B.D. 56 ; Digest, Practice, 362, *746* ; 53 L.J.Q.B. 104.

(4) *Fowler* v. *Barstow* (1881), 20 Ch. D. 240 ; Digest, Practice, 369, *796* ; 51 L.J. Ch. 103 ; 45 L.T. 603.

(5) *Thomas* v. *Hamilton* (*Duchess Dowager*) (1886), 17 Q.B.D. 592 ; Digest, Practice, 371, *816* ; 55 L.J.Q.B. 555 ; 55 L.T. 385.

APPEAL from an order of HILBERY, J., dated Nov. 9, 1937. The facts of the case are set out in the judgments.

C. D. Aarvold for the appellant.

John Neal for the respondent.

Aarvold : There is no authority for the contention that one can serve a statement of claim in wider terms than a writ served out of the jurisdiction of the court. One cannot serve upon a defendant domiciled in Scotland a writ in respect of a breach of contract. There is no mention in the writ of any breach of warranty. If it were otherwise, a plaintiff could obtain leave to sue for fraud, then add a charge for breach of contract, and then drop the fraud charge, and so defeat the purpose of the Common Law Procedure Act, 1852. [Counsel referred to *Lenders* v. *Anderson* (3) and *Diamond* v. *Sutton* (1).]

Neal: It is true that the statement of claim in this case adds an alternative claim but the facts are the same, except that fraud would not have to be proved. By R.S.C., Ord. 20, r. 4, a statement of claim may extend the scope of a writ. There is nothing to suggest that this rule does not apply in cases where a writ has been served out of the jurisdiction of the court. Once a defendant has been brought before the court, a statement of claim can be altered in the usual way. Of course, this method cannot be used as a peg on which to hang a totally different cause of action. The question must be in each case: Is it an abuse of the process of the court? There is no abuse here, nor hardship nor injustice. It is a matter which can conveniently be tried at the same time. R.S.C., Ord. 11, r. 1 (*e*), does not apply to a statement of claim, but only to a writ. [Counsel referred to *Diamond* v. *Sutton* (1), *Fowler* v. *Barstow* (4) and *Thomas* v. *Hamilton* (*Duchess Dowager*) (5).]

GREER, L.J.: Counsel for the plaintiff has done his best, but we are unable to accede to his argument. If it were successful, its effect would be to repeal R.S.C., Ord. 11, r. 1 (*e*), and, indeed, where leave had been properly granted under Ord. 11 to serve a writ out of the jurisdiction for one cause of action, in any case where it was convenient to the plaintiff, subsequently to enable other claims to be added for other causes of action, for which leave to serve a writ outside the jurisdiction would not have been granted. Until the passing of the Common Law Procedure Act, 1852, a writ could not be served out of the jurisdiction in any way. Then later a code was drawn up which is now to be found in R.S.C., Ord. 11, and, unless the plaintiff's case can be brought within the terms of that code, leave to serve a writ out of the jurisdiction cannot be granted. R.S.C., Ord. 11, r. 1 (*e*) prevents service out of the jurisdiction of a writ of summons upon a person domiciled or ordinarily resident in Scotland for a cause of action affording a claim for damages or other relief for or in respect of a breach of contract made within the jurisdiction. In my judgment, the court has no jurisdiction to alter that rule on the ground that it would be convenient to try such a cause of action within the jurisdiction. Counsel for the plaintiff quite rightly called our attention to cases in which it had been held that the proper procedure was to obtain an undertaking from the plaintiff not to add another cause of action to that set out in the writ of summons: see *Diamond* v. *Sutton* (1). In my view, such a step would be taken only *ex abundanti cautela*. It was admitted that the defendant in this case was domiciled in Scotland, and that accordingly a writ claiming damages for breach of warranty on such a contract could not be served on him in Iraq, where, at the material time, he resided. It would be a breach of R.S.C., Ord. 11, r. 1 (*e*) to permit the plaintiff, who had obtained leave to serve notice of the writ on the defendant who was domiciled in Scotland, to serve notice of the writ in Iraq, claiming damages for fraudulent misrepresentation, that is for a tort, and to add to that claim in his statement of claim one for such a breach of warranty. The appeal must be allowed, and the claim for damages for breach of warranty must be struck out of the statement of claim.

SLESSER, L.J.: I agree, and, as we are laying down a rule of practice,
A I think that it is desirable that I should add a few words. The plaintiff issued a writ by which he claimed damages for fraudulent misrepresentation on the sale of a medical practice and a house in Sunderland. By R.S.C., Ord. 11, r. 1 (*ee*), service of such a writ of summons out of the jurisdiction may be allowed, as the action was founded on a tort committed within the
B jurisdiction. The plaintiff applied for leave to serve this writ out of the jurisdiction on a gentleman then resident in Iraq. Leave was granted, and this writ was so served. The statement of claim in the action was served with the writ, and by the statement of claim the plaintiff claimed damages, not only for fraudulent misrepresentation, but also for breach
C of warranty—a claim in contract. By R.S.C., Ord. 11, r. 1 (*e*), leave may be granted to serve a writ of summons out of the jurisdiction on a claim based on a contract made within the jurisdiction "against a defendant not domiciled or ordinarily resident in Scotland." But the defendant on whom the writ claiming damages for fraudulent mis-
D representation had been served was, it is admitted, domiciled in Scotland, and so, had application been made for leave to serve a writ upon him in Iraq, claiming damages for breach of warranty, it would have been refused. On application by the defendant to MASTER BURNAND to strike out from the statement of claim the plaintiff's claim for damages
E for breach of warranty and all reference thereto, the Master dismissed the application, and, on appeal, HILBERY, J., upheld his decision, but gave leave to appeal.

Counsel for the plaintiff contends that, once leave has been granted to serve a writ out of the jurisdiction, and once it has been properly
F served there, it is then competent to add an ancillary claim to that on his statement of claim for a cause of action which was not the claim on the writ which he obtained leave to serve out of the jurisdiction. For this contention he relies on R.S.C., Ord. 20, r. 4, which provides that:

> G whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ.

Indeed, it was pointed out in *Large* v. *Large* (2), where leave was asked to amend the indorsement of a writ and the statement of claim in certain particulars, that, when a statement of claim had once been delivered,
H amendment of the indorsement on the writ was unnecessary. No doubt this provision is convenient, but it does not give a plaintiff a right to insert in his statement of claim a cause of action which, if indorsed on the writ, would have prevented leave to serve it out of the jurisdiction from being granted. In my view, R.S.C., Ord. 20, r. 4, is powerless to give the court general jurisdiction by means of the statement of claim

where such jurisdiction is not afforded by R.S.C., Ord. 11, itself. When the cause of action is based on such a contract, and when the defendant is domiciled or ordinarily resident in Scotland, the court is precluded from granting permission to serve the writ out of the jurisdiction. No doubt that limitation of jurisdiction is confined to the writ, but, in my opinion, it is not competent in such a case, where leave has been granted to serve notice of a writ claiming damages for a tort committed within the jurisdiction and the defendant is domiciled in Scotland, to allow the plaintiff to deliver a statement of claim containing also a claim based on contract, made within the jurisdiction, which was not upon the writ when leave was granted. I agree that the appeal must be allowed.

Scott, L.J.: I agree, and have nothing to add except this. Leave was granted by Swift, J., to serve notice of this writ upon the defendant, who was resident in Iraq but who was domiciled in Scotland. The cause of action indorsed on the writ was a claim for fraudulent misrepresentation committed within the jurisdiction. Doubtless leave was granted upon an affidavit that the plaintiff decided to sue in tort, and not upon an affidavit that the plaintiff desired to sue upon a cause of action in contract within one of the categories contained in R.S.C., Ord. 11, r. 1 (*e*). As the defendant was domiciled in Scotland, under the terms of that rule leave to serve a writ on such a claim out of the jurisdiction would have been refused. By inserting such a cause of action in his statement of claim without leave, the plaintiff cannot be placed in any position better than that in which he would have been had he asked for leave to serve notice of a writ containing this claim and been refused. In my view, the statement of claim must be amended so as to omit any claim for breach of warranty.

Appeal allowed.

Solicitors: *Pilley & Mitchell*, agents for *James Storey & Sons*, Sunderland (for the appellant); *Bell, Brodrick & Gray*, agents for *Reginald C. Dobson*, Leeds (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

DE STEMPEL *v.* DUNKELS.

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **October 27, 28, 29, November 1, 2, December 20, 1937.**]

Libel and Slander—Slander—Words spoken in relation to conduct of business—Special damage.

Master and Servant—Contract of service—Termination—Notice—Commercial contract for an indefinite term—Reasonable notice.

The plaintiff was employed by D., a member of the Diamond Corporation, under an agreement for a year beginning on Jan. 1, 1928. The agreement provided that: "It is the intention of both parties to renew this agreement on expiry for a further period if mutually satisfactory terms can then be arranged." The plaintiff continued in D.'s employment until he was given notice of dismissal, on Nov. 19, 1935, to take effect on Dec. 31, 1935. The plaintiff alleged that the defendant had made to D. certain statements defamatory of the plaintiff, and he also alleged that the defendant wrongfully and maliciously induced D. to commit a breach of contract by dismissing the plaintiff from his employment without proper notice. In an action for damages, the jury found, *inter alia,* that the expression "[the plaintiff] is a Jew-hater" was defamatory, and that the words referred to the plaintiff in relation to his business, but that no special damage had been proved. The jury also found that D. had committed a breach of his contract with the plaintiff, and that the defendant had wrongfully and maliciously induced such breach. The defendant and D. were both of the Jewish faith, and the diamond business is largely carried on by persons of that faith :—

HELD : (i) to call a person a Jew-hater is defamatory.

(ii) the words complained of were spoken of the plaintiff in relation to his business, and so were actionable without proof of special damage.

(iii) the contract was not a yearly hiring, and the plaintiff was entitled to reasonable notice. There had therefore been a breach of this contract.

(iv) (SLESSER, L.J., dissenting) such breach had been procured by the defendant, and the plaintiff was therefore entitled to recover damages.

Order of SWIFT, J. ([1937] 2 All E.R. 215), *varied.*

[**EDITORIAL NOTE.** In the court below, SWIFT, J., held that the words complained of could not refer to the plaintiff in the way of his business, but this conclusion has been reversed by the Court of Appeal. Upon the question of the determination of a contract for service of indefinite duration, which was the subject of the cross-appeal, the decision of SWIFT, J., is affirmed.

AS TO SLANDER IN RELATION TO BUSINESS, see HALSBURY, Hailsham Edn., Vol. 20, p. 401, para. 488 ; and FOR CASES, see DIGEST, Vol. 32, pp. 20-22, Nos. 110-129.

AS TO DETERMINATION OF CONTRACT OF SERVICE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 149, 150, para. 247 ; and FOR CASES, see DIGEST, Vol. 34, pp. 63-67, Nos. 384-444.]

Cases referred to :

(1) *Jones* v. *Jones,* [1916] 1 K.B. 351, *on appeal* ; [1916] 2 A.C. 481 ; 32 Digest 28, *177* ; 85 L.J.K.B. 1519 ; 115 L.T. 432.

(2) *Ayre* v. *Craven* (1834), 2 Ad. & El. 2 ; 32 Digest 37, *343* ; 4 L.J.K.B. 35.

(3) *Lumby* v. *Allday* (1831), 1 Cr. & J. 301 ; 32 Digest 43, *457* ; *sub nom. Lumley* v. *Allday,* 9 L.J.O.S. Ex. 62.

(4) *Fairman* v. *Oakford* (1860), 5 H. & N. 635 ; 34 Digest 57, *327* ; 29 L.J. Ex. 459.

(5) *Buckingham* v. *Surrey & Hants Canal Co.* (1882), 46 L.T. 885 ; 34 Digest 64, *392*.

(6) *The Moorcock* (1889), 14 P.D. 64 ; 12 Digest 611, *5048* ; 58 L.J.P. 73 : 60 L.T. 654.

(7) *Hamlyn & Co.* v. *Wood & Co.,* [1891] 2 Q.B. 488 ; 12 Digest 610, *5042* ; 60 L.J.Q.B. 734 ; 65 L.T. 286.

(8) *Sim* v. *Stretch,* [1936] 2 All E.R. 1237 ; Digest Supp. ; *revsg.* S.C., 79 Sol. Jo. 453.

(9) *Teacy* v. *M'Kenna* (1869), I.R. 4 C.L. 374 ; 32 Digest 72, case *1011 iii.*

(10) *Campbell* v. *Payton* (1898), 17 N.Z.L.R. 91 ; 32 Digest 19, case *e.*

(11) *Gallwey* v. *Marshall* (1853), 9 Exch. 294 ; 32 Digest 38, *349* ; 23 L.J. Ex. 78 ; 22 L.T.O.S. 172.

(12) *Connors* v. *Justice* (1863), 13 I.C.L.R. 451 ; 7 Ir. Jur. (N.S.) 319.

(13) *Creen* v. *Wright* (1876), 1 C.P.D. 591 ; 34 Digest 64, *396* ; 35 L.T. 339.

(14) *Temperton* v. *Russell*, [1893] 1 Q.B. 715; 42 Digest 987, *170*; 62 L.J.Q.B. 412; 69 L.T. 78.

(15) *Allen* v. *Flood*, [1898] A.C.1; 42 Digest 972, *35*; 67 L.J.Q.B. 119; 77 L.T. 717; *revsg.* S.C. *sub nom. Flood* v. *Jackson*, [1895] 2 Q.B. 21.

(16) *Quinn* v. *Leathem*, [1901] A.C. 495; 42 Digest 971, *30*; 70 L.J.P.C. 76; 85 L.T. 289.

(17) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; 42 Digest 988, *174*; 50 L.J.Q.B. 305; A 44 L.T. 75.

(18) *Richards* v. *Gellatly* (1872), L.R. 7 C.P. 127; 22 Digest 374, *3831*; 26 L.T. 435.

(19) *Wiedemann* v. *Walpole*, [1891] 2 Q.B. 534; 22 Digest 374, *3832*; 60 L.J.Q.B. 762.

(20) *Fairlie* v. *Denton* (1828), 3 C. & P. 103; 22 Digest 374, *3824*. B

(21) *Jones* v. *Littler* (1841), 7 M. & W. 423; 32 Digest 34, *291*; 10 L.J. Ex. 171.

(22) *Cayme* v. *Allan, Jones & Co.* (1919), 35 T.L.R. 453; 34 Digest 56, *308*.

(23) *Williams* v. *Byrne* (1837), 7 Ad. & El. 177; 34 Digest 66, *418*; 6 L.J.K.B. 239.

(24) *R.* v. *Hampreston (Inhabitants)* (1793), 5 Term Rep. 205; 34 Digest 57, *317*.

(25) *R.* v. *Worfield (Inhabitants)* (1794), 5 Term Rep. 506; 34 Digest 52, *269*. C

(26) *Langton* v. *Carleton* (1873), L.R. 9 Exch. 57; 34 Digest 63, *387*; 43 L.J. Ex. 54; 29 L.T. 650.

(27) *Down* v. *Pinto* (1854), 9 Exch. 327; 34 Digest 55, *295*; 23 L.J. Ex. 103; 22 L.T.O.S. 247.

(28) *Foxall* v. *International Land Credit Co.* (1867), 16 L.T. 637; 34 Digest 56, *309*. D

(29) *Stevenson* v. *North British Ry. Co.* (1905), 7 F. (Ct. of Sess.) 1106; 34 Digest 66, case *d*.

(30) *Re African Assocn., Ltd., & Allen*, [1910] 1 K.B. 396; 34 Digest 64, *401*; 79 L.J.K.B. 259; 102 L.T. 129.

(31) *Vibert* v. *Eastern Telegraph Co.* (1883), Cab. & El. 17; 34 Digest 65, *408*.

(32) *Payzu* v. *Hannaford*, [1918] 2 K.B. 348; 34 Digest 65, *404*; 87 L.J.K.B. E 1017; 119 L.T. 282.

(33) *Savage* v. *British India Steam Navigation Co., Ltd., Power* v. *British India Steam Navigation Co., Ltd.* (1930), 46 T.L.R. 294; Digest Supp.

(34) *Grundy* v. *Sun Printing & Publishing Assocn.* (1916), 33 T.L.R. 77; 37 Digest 541, *29*.

F

APPEAL AND CROSS-APPEAL from a decision of SWIFT, J., dated Feb. 25, 1937, and reported in [1937] 2 All E.R. 215.

Norman Birkett, K.C., and *Gerald Gardiner* for the appellant, Baron de Stempel.

Sir Patrick Hastings, K.C., and *Valentine Holmes* for the respondent, G Major Dunkels.

Birkett, K.C.: The jury have found that these words were defamatory. They are actionable because they refer to the plaintiff in the way of his profession. In *Jones* v. *Jones* (1) the words did not directly touch the plaintiff's profession; here they do. It cannot be contended that the H words "he is a Jew-hater" are not capable of bearing a defamatory meaning. The defendant was saying everything he could to disparage the plaintiff. [Counsel referred to *Sim* v. *Stretch* (8).] The words were spoken, admittedly, in order to determine the plaintiff's employment. They must be words spoken in relation to his profession.

Gardiner (following on the same side): *Jones* v. *Jones* (1) shows that it is not sufficient that the words spoken may injure the plaintiff in his profession. There must also be some connection between the words used and the business. [Counsel referred to *Jones* v. *Littler* (21).]

Hastings, K.C.: The case of *Jones* v. *Jones* (1) laid down no new A law. It gave the history of the law of slander, and said that one cannot extend that law, but must bring one's case within one of the recognised exceptions. The words complained of must be spoken of the plaintiff in reference to his character in his profession. It is not enough that there should be probable consequences deleterious to him. The intention B of the speaker is immaterial: *Lumby* v. *Allday* (3).

Birkett, K.C., in reply: The defendant said that the words were applied to the plaintiff in the way of his trade, and the jury found that that was so. They were spoken to his employer.

Hastings, K.C., opening the cross-appeal: It is submitted that there is C no cause of action here at all. Whether the termination of the plaintiff's contract was legal or not, Walter Dunkels never procured the defendant to do anything, and certainly never procured him to do anything illegal. [Counsel referred to *Templeton* v. *Russell* (14).] It is submitted that the termination of the contract was lawful. A contract of service for D a year is determinable by either party at the end of that year. With a contract, originally for a year, thereafter continued with no variation except as to quantum of remuneration, the same considerations apply. The old contract of service for a servant was for a year. That applied to every contract of service. But, as time went on, custom E changed this. In cases of contracts for an indefinite time, notice will be required by law, but, where there is a contract for a year, then there is no need of notice, unless there be a custom to the contrary. On the renewal of this contract, the same conditions were implied, and there was no implication as to notice. Every prolongation of a yearly hiring F is itself a yearly hiring. [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, pp. 144, 149, SMITH'S MASTER AND SERVANT, 8th Edn., p. 36, LEAKE ON CONTRACT, 3rd Edn., p. 585, *Cayme* v. *Allan, Jones & Co.* (22), *Buckingham* v. *Surrey & Hants Canal Co.* (5), CHITTY ON CONTRACTS, 19th Edn., p. 895, *Williams* v. *Byrne* (23), *R.* v. G *Hampreston* (*Inhabitants*) (24), *R.* v. *Worfield* (*Inhabitants*) (25), *Langton* v. *Carleton* (26), *Fairman* v. *Oakford* (4), *Down* v. *Pinto* (27), *Foxall* v. *International Land Credit Co.* (28), *Stevenson* v. *North British Railway Co.* (29), *Re African Assocn., Ltd., & Allen* (30), and *Allen* v. *Flood* (15).]

Birkett, K.C.: If there has been a breach of contract, it is admitted that H the defendant procured it, and the question of notice is irrelevant. The rule that a year's notice was necessary applied only to workers in husbandry, and to a few other cases. This court is not bound by the decisions in *Buckingham* v. *Surrey & Hants Canal Co.* (5) or *Cayme* v. *Allan, Jones & Co.* (22). [Counsel referred to *Vibert* v. *Eastern Telegraph Co.* (31), *Payzu* v. *Hannaford* (32), *Fairman* v. *Oakford* (4), *Re African*

Association, Ltd., & Allen (30), *Creen* v. *Wright* (13), *Savage* v. *British India Steam Navigation Co., Ltd.* (33), and *Grundy* v. *Sun Printing & Publishing Association* (34).]

Hastings, K.C., in reply.

GREER, L.J. (read by SLESSER, L.J.): The appellant in this case is a Russian *émigré*, Baron Victor de Stempel. The respondent, Walter Dunkels, is a diamond merchant. He is a member and a leading director of the Diamond Corporation in England, and his step-daughter was married to the appellant. There are several issues in the action relating first of all to certain defamatory words which, it was alleged by the appellant, had been uttered by the respondent, and there was a much more serious issue as to whether there was any evidence against the respondent that he had induced his cousin, Otto Dunkels, to break the contract of employment under which the appellant was assisting him in his business of a diamond broker. Certain questions were agreed as the proper questions to be submitted to the jury at the trial, and the judge took the verdict of the jury on all the issues, reserving the question as to whether there was any evidence on which the jury could find in favour of the plaintiff, Baron Victor de Stempel. The words complained of in the statement of claim as actionable slander are as follows:

> [Para. 4 (*a*)] I am not interested in Dunkels & Co. [meaning the said business of the said Otto Dunkels] or their clients' business so long as Victor [the plaintiff] is in your employ. [Para. 5 (*a*)] You ought to turn Victor out. [Para. 6 (*a*)] Victor told me that I was the only honest man in the syndicate [the said Corporation]. [Para. 7 (*a*)] Victor is a Jew-hater. [Para. 8 (*a*)] You ought to get rid of Victor at once. [Para. 9 (*a*)] Regardless of the outcome of the negotiations between Victor and Dawn [the wife of the plaintiff and step-daughter of the defendant] Victor must never enter my premises again [meaning the premises No. 8, Charterhouse Street, in the City of London, the premises of the said Corporation]. This will ease things for you. As Victor is no longer allowed to assist you at the Corporation he is worth much less to you. You can kick him out or reduce his salary to £500 because any clerk receiving even less than £500 could do his work . . . It will make it more difficult for him [the plaintiff] to employ solicitors.

Unless the words were incapable of a defamatory meaning, it was, of course, for the jury to determine whether or not they were defamatory. In respect of all the alleged defamatory words, except those mentioned in paras. 7 (*a*) and 9 (*a*), the jury found that they were not defamatory. It is impossible for the plaintiff to complain of this finding, as the question was clearly a question for the jury. The question arose at the trial whether the words alleged in paras. 7 (*a*) and 9 (*a*) were capable of a defamatory meaning, and also whether, assuming them to be defamatory, they were actionable as relating to the plaintiff or touching him in his business or occupation. This question having been reserved for the decision of the judge after the findings of the jury, the judge decided that the words which the jury had found to be defamatory were not actionable, in that they did not relate to or touch him in his capacity as an assistant to Otto Dunkels, and, without special damage, which the jury did not find, they were not actionable. The question in the appeal is whether the judge was right in law in so finding.

As regards the cross-appeal, the judge found that there was evidence in support of the jury's finding that the defendant wrongfully procured Otto Dunkels to commit a breach of his contract with the plaintiff, and gave judgment for the £6,000 damages found on this head by the jury to be due to the plaintiff.

In my judgment, the judge was wrong in the view he ultimately formed on the question of whether the alleged slanders were actionable as defamatory words which related to or touched the plaintiff in his business or occupation, and therefore the appeal ought to be allowed. I further think that the judge was right on the main question that there was evidence upon which the jury could find that the defendant induced and procured Otto Dunkels to commit a breach of his contract with the plaintiff. The facts are a little complicated, and, in order that the questions involved may be understood, it is necessary to make a short statement of the facts which gave rise to the disputes among the plaintiff, his wife, and his wife's mother, who was the second wife of the defendant.

Some time after the plaintiff left Russia, he met the defendant's step-daughter, and, after becoming engaged to her, married her in June, 1928. The married couple for a time stayed at the defendant's house, and, as the judge said in his judgment:

> from the beginning it is undisputed that Mr. Walter Dunkels, no doubt having the interest and welfare and future of his step-daughter at heart, did his best to assist Baron de Stempel to establish himself in this country, to earn a living in this country, and to become naturalised as a British subject. In the course of the good offices which he performed for Baron de Stempel—and there is no doubt about those good offices whatever—Mr. Walter Dunkels secured him employment with Mr. Otto Dunkels, who was a diamond-broker with whom Mr. Walter Dunkels had very important business connections.

For several years the Baron and Baroness de Stempel lived quite happily together, but after a time disputes arose between them. In these disputes, Mr. Walter Dunkels sided with his step-daughter, the Baroness, and, as the judge said, the bitterness between husband and wife increased. There was some evidence that the Baron had made serious charges against his wife, and against his wife's mother, and I think that the judge's observation to the effect that Mr. Water Dunkels conceived for his step-son-in-law, Baron de Stempel, a dislike which undoubtedly ultimately turned into bitter hatred was justified by the evidence given at the hearing. As the judge says:

> Whether he was right in holding those feelings or whether he was wrong, it is not for this court to say. That there was some justification for his feelings if we were told the truth by Mr. or Mrs. Franklin nobody can doubt. Whether we were told the truth by them or not, I do not know. I assume from the answers of the jury that they did not accept their evidence.

It seems necessary to state in what way the plaintiff alleged his claim that the defendant wrongfully and maliciously induced and procured the said Otto Dunkels to commit the said breach of his contract with the plaintiff, because both parties were at the trial held strictly to their cases as pleaded. The plaintiff's case is stated in para. 12 of the par-

ticulars of the statement of claim. It was admitted by Mr. Gardiner,
who signed the statement of claim, that he did not ask the court to go
outside the particulars as alleged in the statement of claim. It is
necessary, therefore, to consider what evidence there was that the
defendant induced and procured the said breach by procuring Louis
Oppenheimer, the managing director of the Corporation, to tell Otto A
Dunkels that the plaintiff must not go to the offices of the Corporation
again until he and his wife had arrived at an amicable settlement of
their differences. Certain questions were framed for the consideration
of the jury, both as regards the slanders and as regards the inducement
to commit the breach of contract. The questions and the answers B
thereto are as follow:

1. Are the words complained of in fact defamatory? (i) I am not interested
in Dunkels & Co. or their clients' business so long as Victor is in your employ?—
No; (ii) You ought to turn Victor out?—No; (iii) Victor is a Jew-hater?—Yes;
(iv) You ought to get rid of Victor at once?—No; (v) Regardless of the outcome
of the negotiations between Victor and Dawn, Victor must never enter my premises C
again. This will ease things for you. As Victor is no longer allowed to assist you
at the Corporation he is worth much less to you. You can kick him out or reduce
his salary to £500 because any clerk receiving even less than £500 could do his
work. It will make it more difficult for him to employ solicitors?—Yes.
2. If so, are they actionable: (*a*) Because they refer to the plaintiff in relation
to his business?—Yes; (*b*) And/or by reason of special damage flowing from their
publication?—Yes; (*c*) Has any special damage been proved, i.e., did Otto Dunkels D
improperly dismiss the plaintiff as a reasonable and probable consequence of hearing
the words?—No. 3. Privilege.—Was the defendant in publishing any defamatory
words which he did actuated by malice?—Yes. 4. Were the words "Victor is
a Jew-hater" true?—No. 5. What damages, if any, for the alleged slanders—
No. 3, £100, No. 5, £100. 6. Did Otto Dunkels commit a breach of his contract
with the plaintiff?—Yes. 7. Did the defendant induce and procure Otto Dunkels
to commit a breach of his contract with the plaintiff?—Yes. 8. If yes to No. 7,
did he do so wrongfully and maliciously?—Yes. 9. Was the defendant justified E
in what he did?—No. 10. Damages, if any, for procuring breach of contract?—
£6,000.

At the hearing of the appeal, Sir Patrick Hastings, for the defendant,
said that he could not contend that the words "Victor is a Jew-hater"
were not capable of a defamatory meaning. He did not admit that the F
words referred to in para. 9 of the statement of claim were capable of
a defamatory meaning, but the jury found that they had a defamatory
meaning, and, speaking for myself, I regard it as impossible to hold that
they were not defamatory. The sole question, therefore, with regard
to the slanders alleged in paras. 7 and 9 of the statement of claim is G
whether they related to the plaintiff or attached to him in his profession
or business. In my judgment, they clearly did.

As I understand the course of the trial, it was never in dispute that
the defendant had used about the plaintiff to Mr. Otto Dunkels the
words stated in paras. 7 and 9 of the statement of claim with the object H
of persuading Otto to cease to employ the plaintiff, and, as I have said,
I think that those words are capable of a defamatory meaning. The
sole question which the judge had to decide with regard to those words
was whether they were actionable as words which related to the plaintiff
in his business or occupation. It seems to me beyond dispute that they

did so relate. If the words had been spoken to any person other than the plaintiff's employer, it might possibly have been said that they had no relation whatever to his employment, but, inasmuch as they were said with the object of inducing the employer to cease to employ the plaintiff, it seems to me impossible to hold that they did not relate to or touch him in his employment. I have very little doubt that if Mrs. Jones, in the case of *Jones* v. *Jones* (1), had gone to the plaintiff's employers and said to them : " Mr. Jones is an unfit person to be a teacher because he has committed adultery with the wife of the caretaker," the result of that case would have been very different from what it was, and the House of Lords would have held that the words so used necessarily meant that the plaintiff was being defamed in relation to his employment. But the words in *Jones* v. *Jones* (1) were not spoken to the employer, and it seems to me that that makes all the difference. I think that the words which the jury have found were defamatory were spoken to the plaintiff's employer in order to defame him in his character as an employee, and to induce Otto Dunkels, the employer, to get rid of him. I fail altogether to understand how it can be said that these words do not relate to or touch the plaintiff in his office or employment. In the same way, I should think that the doctor plaintiff in *Ayre* v. *Craven* (2) would have been entitled to succeed if the defamatory statement had been made to the president of the Medical Association, with a view to inducing that body to have his name removed from the medical register. It seems to me that, in order to decide this question, one has got to take into account, not only what words were used, but also to whom they were spoken. In addition to *Jones* v *Jones* (1), the respondent relied on the decision in *Lumby* v. *Allday* (3), decided in the Exchequer of Pleas in 1831, in support of the judge's judgment. It will be observed that in that case the words complained of were not spoken to the employers of the plaintiff. If they had been, it seems to me that they would have been held by the court, whose judgment was delivered by BAYLEY, J., to be actionable. In the course of the judgment of the court, BAYLEY, J., used these words, at pp. 305, 306 :

> It is not alleged that they are spoken of him in reference to his character or conduct as clerk ; that they do not, from their tenor, import that they were spoken with any such reference ; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk. . . . Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion, that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as a clerk.

Inasmuch as the statements made by the defendant in the present case were made to the plaintiff's employer in order to show that the plaintiff was a person whom it was not, by reason of his conduct and character, desirable that the employer should continue to employ, it seems to me to be true that the words complained of were, to use the words of Bayley, J., by their very nature, and by the circumstances relating to their publication, connected with the plaintiff's office, trade, or business. I accordingly think that the case of *Lumby* v. *Allday* (3), like the cases of *Jones* v. *Jones* (1) and *Ayre* v. *Craven* (2), does not compel this court to hold that words of the kind imputed to the defendant as being said to the employer of the plaintiff are not actionable without proof of special damage. Notwithstanding the decision of the judge, who gave the most careful consideration to all the questions involved in this difficult case, I have arrived without any doubt at the decision that he was wrong in holding that the two statements found by the jury to be defamatory did not relate to the plaintiff in respect of his office, business, or calling, and that he was therefore wrong in holding that they were not actionable in the absence of proof of special damage. My brethren think that the words used in the second alleged slander are, in the circumstances, not capable of a defamatory meaning. I gravely doubt whether this view is right, but I do not think it worth while to differ from my brethren on a matter which is not of vital moment to the parties to this appeal.

The other question is more involved and more difficult, having regard to the way in which the matter was pleaded. It was contended by Sir Patrick Hastings that, inasmuch as the plaintiff's first engagement was for a year certain, a continuation of his employment in each subsequent year was either, by implication, an agreement for a year only. or, if not, at any rate, an agreement for an indefinite period, which by law is necessarily an agreement for one year only. At one time, he contended strenuously that the defendant did not intend to induce Otto Dunkels to determine the plaintiff's agreement other than in a lawful manner, but, as I understood his argument, he abandoned this contention, and admitted that he could not suggest that the defendant was merely trying to get Otto Dunkels lawfully to put an end to the plaintiff's employment. In my judgment, it would be wrong to hold that each year there was, by implication, a fresh agreement for one year certain, and nothing more. It must be remembered that his first employment was a temporary one, for one year only, inasmuch as it was not certain that the Home Office would do what they afterwards did—namely, give him liberty to stay indefinitely in this country. I also think that it is no longer the rule applicable to all cases that an indefinite hiring is a hiring for a year only. In my judgment, Pollock, C.B., was right when he said in *Fairman* v. *Oakford* (4) that there is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances. One of the circumstances which determines matters of this sort may be a custom proved with regard to the particular employment, but there may be other circumstances pointing in the same direction. In *Buckingham* v. *Surrey & Hants Canal Co.* (5), the plaintiff was an engineer. He was employed as an engineer by the defendants at a salary of £500 a year, and was dismissed at 3 months' notice. If his hiring was necessarily a hiring for a year, he was entitled to remain until the end of the year, and could not be discharged by notice within the year. It was decided that the plaintiff could not be discharged by the 3 months' notice. In giving that decision, GROVE, J., said this, at p. 886:

> As a general rule, where the hiring is a yearly hiring, it cannot be put an end to by either party before the end of the year. This rule, however, is subject to an exception in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice. Now, at the conclusion of the plaintiff's case, no evidence was offered on behalf of the defendants of any custom to determine such hiring as this by a three months' notice. It seems to me, therefore, that the judge was bound to direct the jury that in the absence of any such evidence the hiring was a hiring for a year. There is nothing to show that the plaintiff accepted the engagement upon any other terms than those expressed in the resolution. The plaintiff established a *prima facie* case of a yearly hiring, and therefore, in the absence of any evidence of custom to rebut that *prima facie* case, I think the verdict ought to stand.

Assuming, in the present case, that the hiring was a yearly hiring, it could not be determined before the end of the year unless it were proved that there was some custom, or some term in the contract, or some circumstance, which justified the inference that something other than a hiring for a year certain was intended. The plaintiff in this case was not given a sufficient notice, if he was entitled to any notice at all, but, inasmuch as the year expired, and he has not been employed since, it is contended that he is not entitled to complain. The rule with regard to an indefinite hiring, being, in the absence of a special agreement to the contrary, a hiring for a year, arose out of the hiring of agricultural labourers, which usually took place at a particular time in each year. Undoubtedly, in the last case referred to, it was applied to the engagement of an engineer at £500 a year. I think that it ought not to have been so applied, as it is unreasonable to suppose that either the employer or the engineer contemplated, when they entered into their agreement, that the agreement should be determined other than by reasonable notice. Applying the rule as to implied contracts stated by BOWEN, L.J., in *The Moorcock* (6), and that stated by LORD ESHER in *Hamlyn & Co.* v. *Wood & Co.* (7), I think that there must be implied in the contract between the plaintiff and Otto Dunkels in the present case a term to the effect that the plaintiff's employment should be determined only by a reasonable notice, and that, accordingly, the defendant, who, by his constant and repeated efforts, which up to a point were unsuccessful, in the end induced Otto Dunkels to regard the position as so unsatisfactory that he was ready to get rid of the plaintiff at any price, and did so without sufficient notice.

A further question arises for decision as to whether there was any evidence upon which the judge could hold, as he must have done, that the defendant induced Louis Oppenheimer to forbid the plaintiff the access to the Corporation, which was essential to his continuing efficiently to carry out his duties to his employer. In the letter of Nov. 16 from Otto Dunkels to the defendant, he wrote :

> You have now persuaded Mr. Louis Oppenheimer to tell me that Victor must not come to the office of the Corporation. Again another ban ! Mr. Louis Oppenheimer restricted it to a fixed time, i.e., until Dawn and Victor arrive at an amicable settlement. You went further and told me that, regardless of the outcome of the negotiations, he must never enter your premises again. I accept your decision. I have told Victor of it, and I will see to it that he does not come to 8, Charterhouse Street again.

It will be seen that in this letter there is a clear and definite statement that the decision of Mr. Louis Oppenheimer that the plaintiff was not to go to the office of the Corporation, was due to the persuasion of the defendant, and that, in consequence of that persuasion, Otto Dunkels ceased to offer the resistance with which he had hitherto opposed the efforts of the defendant to get rid of the plaintiff. The defendant and Otto Dunkels, according to the evidence, had frequent conversations with one another after this letter, and, though the former had many opportunities of denying that statement, he did not avail himself of such opportunities. I think that this afforded ample evidence from which it could be inferred that the defendant did not repudiate the suggestion, because he knew it to be true, though I do not think that the mere fact that he did not answer the letter would be sufficient in itself. The defendant was in the habit of lunching nearly every day with Mr. Louis Oppenheimer, and, having regard to the state of his mind with regard to his step-son-in-law, it is inconceivable to me that he should not use the many opportunities he had of putting on Mr. Louis Oppenheimer such pressure as would of necessity produce the result he desired, by bringing about the termination of the plaintiff's engagement by his cousin, Otto Dunkels. In these circumstances, I think that the judge was right in his view that the plaintiff had made out his case of an intentional procuring of the breach of contract by the dismissal of the plaintiff without notice.

It is not without importance to note that the defendant, Mr. Otto Dunkels, Mr. Louis Oppenheimer, and other leading spirits in the Diamond Corporation, and a very large number of the customers of Otto Dunkels, are Jews, and that a Jew-hater is not likely to commend himself to the members of the Corporation when he inspects diamonds with a view to buying them for a customer. It is clear, however, that the alleged slanders were not sufficient to induce Otto Dunkels to put an end to the plaintiff's employment, and that the jury were right in finding that the alleged slanders had failed in procuring the plaintiff's dismissal. This is quite clear from the wording of Otto's letter, but it does not follow that his further persuasion through Louis Oppenheimer did not have that result. In my judgment, the appeal succeeds to the extent of £100 with costs, and the cross-appeal fails with costs.

SLESSER, L.J. : The first slander complained of is thus pleaded : in or about the month of Oct., 1935, the defendant falsely and maliciously spoke

> and published of the plaintiff and of him in the way of his said occupation to the said [Otto Dunkels] the following words: "Victor [the plaintiff] is a Jew-hater."

To this an innuendo was pleaded that the defendant meant, and was understood to mean, that the plaintiff was a man who held and exhibited violently anti-semitic views, that he was not a man who ought to be
A employed in any business which traded with, *inter alia*, Jewish customers, and, in particular, that he ought not to be employed in the said business. As to this alleged slander, Sir Patrick Hastings admitted that, in the primary sense, it was capable of a defamatory meaning. He said that he was constrained to agree with the view, which I had expressed during
B the argument, that to say of any man that he was a "hater" of any person or class of persons was capable of a defamatory meaning. Hatred of anything but wickedness may well be considered to be a vice or a sin. In the Litany where a public recognition of morality and social obligation may properly be sought, there is prayer for delivery from
C hatred, malice, and all uncharitableness, and, in a Christian country such as England, to say that a man is possessed of hatred is, in my opinion, "likely to tend to lower him in the estimation of right-thinking members of society generally," to quote the test mentioned by LORD ATKIN in *Sim* v. *Stretch* (8). In Ireland it has been held defamatory
D to say of a man that he is intolerant: *Teacy* v. *McKenna* (9). In New Zealand, it has been held defamatory to say of a man that he has been guilty of unbrotherly conduct: *Campbell* v. *Payton* (10). I would add to the category the statement that a man is afflicted by hatred.

Sir Patrick Hastings, however, notwithstanding this admission, argued
E that, on the findings of the jury, the words are not actionable in law. The jury found that no special damage had been proved as a consequence of Otto Dunkels' hearing the words, and, no other special damage being suggested, it was conceded by Mr. Birkett, for the plaintiff, that the only way in which he could establish his right to damages was by relying
F on the finding of the jury that the words referred to the plaintiff in relation to his business.

The test to be applied in such a case is most clearly laid down in *Jones* v. *Jones* (1), in the language of SWINFEN EADY, L.J., approved by the House of Lords on appeal to their Lordships ([1916] 2 A.C. 481),
G in the following words, at p. 361:

> It is well settled that words spoken, although calculated to injure a person in his profession, vocation, or office, but not relating to his conduct or capacity therein, are not actionable *per se*.

In other words, as it has been compendiously stated, the words must be
H spoken of him touching or in the way of his calling.

Sir Patrick admits that the business with which the plaintiff was concerned traded largely with Jewish customers, and that, therefore, for the plaintiff to be known as a Jew-hater might be calculated to injure him in his calling. He submits, however, that, although the words might well have the effect of injury, that alone would not be enough, in the restricted ambit of actionable slander without special damage, as now laid down in *Jones* v. *Jones* (1), to maintain the action.

This contention as a matter of general principle, that a mere likelihood of injury or concern to the business is not alone enough to sustain the action, is now unimpeachable. On the other hand, there remain for consideration those classes of case where it has been held that, in the circumstances of a particular slander, the words may be such in fact—not merely in tendency, but actually—as to concern injuriously or of necessity to touch a plaintiff in his business. The oft-quoted example of the trader said to be insolvent is an example of the latter class, as is also the imputation of immorality to a beneficed clergyman, cases where the law will assume of necessity that the words spoken must touch the trader: see the cases mentioned by Lord Wrenbury in *Jones* v. *Jones* (1), at p. 507, and see, as to a priest, *Gallwey* v. *Marshall* (11). But there are other cases where, on the evidence in fact, apart from presumption, to quote Gatley on Libel and Slander, 2nd Edn., p. 60, there may be reference:

> direct or indirect, in the words themselves, or in the circumstances attending their utterance, which connects the subject-matter of the slander with the . . . . trade carried on by the plaintiff.

An imputation of unchastity in a servant-girl in relation to her employment has been held to be actionable upon this principle: *Connors* v. *Justice* (12). There the words complained of were:

> I was so incensed with that girl for coming to hire with me after having had a miscarriage at Mrs. B.'s house and sent away by her in a car.

No statutory protection of the reputation of women for chastity could then be invoked, but counsel for the plaintiff argued that:

> If a particular quality be essential for carrying on a trade, an impeachment of it is actionable.

Monahan, C.J., accepting this contention, and distinguishing the case from *Lumby* v. *Allday* (3) and *Ayre* v. *Craven* (2), said, at p. 157:

> Can anyone doubt that chastity is a necessary qualification in a female domestic servant?

Under the old pleading, the declaration would always show how the speaker connected the defamatory words with the trade: see Bullen and Leake, 3rd Edn., p. 308.

Bearing these considerations in mind, I turn to the all-important letter of Otto Dunkels, dated Nov. 16, 1935, where the words said and admitted to have been spoken by Walter Dunkels of the plaintiff, "a Jew-hater," are preceded by the words: "I want to clear up some points which you have repeatedly brought in order to induce me to kick him out." That it would be a fatal disqualification, in a trade largely carried on with and dependent upon Jews, to be known as a Jew-hater is scarcely disputed. If the plaintiff had been a teacher in a Jewish school the matter could scarcely have been more obvious. I think that there was evidence on which a jury might properly find, as they here must be taken to have done, having regard to the words used, and to the purpose and context in which they were spoken, that they were necessarily spoken to the employer, Otto Dunkels, in order to effect the plaintiff's dismissal, in relation to the plaintiff's trade, and were not merely to be taken as calculated to affect him adversely therein. I agree with Greer, L.J., that as to the £100 attributable to this slander this part of the plaintiff's appeal succeeds.

The second statement complained of, admitted by Mr. Walter Dunkels to have been made to Mr. Otto, was as follows :

> Regardless of the outcome of the negotiations between Victor [the plaintiff] and Dawn [the wife of the plaintiff and step-daughter of the defendant] Victor must never enter my premises again [meaning the premises No. 8, Charterhouse Street, in the city of London, the premises of the Diamond Corporation]. This will ease things for you. As Victor is no longer allowed to assist you at the Corporation [meaning the said Corporation] he is worth much less to you. You can kick him out or reduce his salary to £500 because any clerk receiving even less than £500 could do his work.

As to these words, the defendant says that they are incapable of a defamatory meaning. I agree. The jury have themselves earlier found that the words " Victor must never enter my premises again " were not defamatory, and the statement that " any clerk receiving even less than £500 could do his work " cannot of itself be reasonably held to be defamatory in a context which merely speaks of the economic value of the plaintiff or anyone else in his position, if he were no longer allowed to do the principal work for which he was engaged—namely, to assist Otto Dunkels in the offices of the Diamond Corporation. These words, I think, though it is not necessary to decide the point, might well be said to touch the plaintiff in the way of his calling, but, not being capable of any defamatory meaning, the plaintiff must fail *in limine.*

This finding concludes the appeal, which, therefore, in my opinion, succeeds as to £100. I turn to the cross-appeal from a judgment against the defendant for £6,000 for wrongfully and maliciously inducing and procuring Otto Dunkels to commit a breach of his contract with the plaintiff.

To establish the plaintiff's right to receive such damages it is first necessary closely to examine the agreement the breach of which the defendant is said wrongfully to have induced and procured. Particulars of the contract were finally given during the course of the trial, and were as follows :

> The contract of employment was originally in writing and was made by an agreement dated Jan. 2, 1928. The same was of a temporary nature as appears from the terms thereof. In the month of Jan., 1929, it was orally agreed between the plaintiff and the said Otto Dunkels that the said employment should continue indefinitely and that the plaintiff's remuneration should be increased to 15 per centum of the annual net profits of the said business. In or about the month of Jan., 1933, it was orally agreed between the plaintiff and the said Otto Dunkels that the plaintiff's remuneration should be increased to 20 per centum of the annual net profits of the said business.

The agreement, thus stated to be an oral one, was to continue indefinitely, and, if, as Sir Patrick Hastings contends, it is an agreement for a yearly hiring, to expire at the termination of each year, in so far as Mr. Otto Dunkels did not purport to dismiss the plaintiff during, but continued the employment until the end of, the year 1935, there was no breach.

Although much argument was devoted to the elucidation of the legal constituents of a yearly hiring, there is no doubt in my mind that the law is correctly summarised in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, p. 144, as follows :

> If a contract of hiring and service is a general hiring, that is to say, without limitation of time, there is a presumption that the hiring is for a year, whether the contract is oral or in writing. This presumption exists not only when the original contract was a general hiring, but also when, at the expiration of a contract for a definite period of service, the service is continued under a second contract which is indefinite as to time.

On the other hand, as has frequently been said, the presumption of a yearly hiring is capable of rebuttal. It is not an inflexible rule, and the nature of the contract must be considered in connection with the circumstances of each case : per POLLOCK, C.B., in *Fairman* v. *Oakford* (4), approved by LORD COLERIDGE, C.J., in *Creen* v. *Wright* (13) at p. 594.

I turn, therefore, to the evidence in the case, to see if there were here any circumstances from which a jury might properly conclude, as they must be taken to have done, that this was not a yearly hiring. The plaintiff stated that it was agreed in Jan., 1929, when the new agreement was entered into, that he should remain in the business as long as the business existed. This he explains to mean that he was under the impression that it was not for one year but for as long as the business was going on. He explained that the original written agreement (which was undoubtedly for a year) was limited because of the uncertainty of the renewal of his licence from the Home Office to remain in England. Indeed, this fact was recognised in the written agreement itself. He says that the agreement was not thereafter made for one year ; it went on from year to year. In his own words, " I simply went on." He points out, in corroboration of this, that Mr. Otto Dunkels had offered him a partnership, an offer far more consistent with a continuing agreement than a hiring from year to year. Mr. Otto Dunkels himself, as I understand him on this point, does not really contradict the plaintiff. He says, speaking of this agreement : " We agreed the agreement was a temporary thing until the Home Office had given permanent permission." He is asked : " Would it be right to say that your idea was that it should continue indefinitely ? " To this Mr. Otto Dunkels answers, not that it was a yearly agreement, but " perhaps not for ever." Finally he said : " It would go on indefinitely until something arose which would make a desire to separate," and he said that by Jan., 1929, the Home Office decision was given, and the plaintiff could enter into a permanent relationship with Mr. Otto Dunkels. On this evidence, coming both from the plaintiff and from Mr. Otto Dunkels, I think that the jury were fully entitled to come to the conclusion that, in all the circumstances of the case, the plaintiff had entered into an agreement to continue until reasonable notice had been given, or, alternatively, that the agreement was to continue during the currency of Mr. Otto Dunkels' business, as long as the plaintiff was ready and willing to carry out his part of the contract.

On this finding, the next and decisive question that arises is whether there was any evidence before the jury that Mr. Walter Dunkels did that wrong which is alleged against him in the statement of claim as particularised—namely, that he wrongfully and maliciously induced and procured Otto Dunkels to commit the breach of his contract with the plaintiff. In such a case as this, the plaintiff must be confined to his particulars: *Temperton* v. *Russell* (14). The defendants are entitled to know the kind of pressure which was used, and by whom it was exerted. The particulars must disclose the nature of the means used to induce the breach of contract (per BOWEN, L.J., at p. 322), and, in obedience to this requirement, the plaintiff delivered particulars as follows:

> By procuring one Louis Oppenheimer, the managing director of the said Corporation, on or about Nov. 11, 1935, to tell the said Otto Dunkels that the plaintiff must not go to the offices of the said Corporation again until he and his wife, the defendant's step-daughter, had arrived at an amicable settlement of the differences then existing between them—namely, the plaintiff's difficulties in obtaining proper access to his son and his objections to the environment in which his said son was being brought up.

To these particulars the plaintiff is now confined (a plea of procurement of breach by slander was negatived by the jury and need not be considered), and, though I have searched the evidence most closely to find if there is any evidence which supports the allegations contained therein, I can find none.

The violation of the legal right by interference with the contractual relations must be knowingly done: per LORD WATSON in *Allen* v. *Flood* (15), at p. 96; *per* LORD MACNAGHTEN in *Quinn* v. *Leathem* (16), at p. 510: an act must be done which in law and in fact is wrongful for action on the case to lie; *per* BRETT, L.J., in *Bowen* v. *Hall* (17), at p. 337.

It is true that there is evidence, almost uncontradicted, that, from Aug., 1933, onwards, Mr. Walter Dunkels had been putting pressure upon Otto to put the plaintiff out of his business. On Nov. 16, 1935, Otto Dunkels writes to the defendant: " I want to clear up some points which have been recently brought in order to induce me to kick him out." But at that time, despite the pressure by the defendant, Otto Dunkels had refused to dismiss the plaintiff, saying to the defendant:

> time after time you forced me to kick Victor [the plaintiff] out and I always gave you the same reply. I will go a long way to be helpful, to influence Victor, but I refuse to do anything I cannot reconcile with my conscience.

There is also strong evidence that, inasmuch as 90 per cent. to 95 per cent. of Otto Dunkels' business was with the Diamond Corporation, the steps admittedly taken by the defendant to attempt to prevent the plaintiff from going to, or taking clients to, the Diamond Corporation office would, if successful, necessarily render the plaintiff almost useless to Otto Dunkels. Finally on this matter, the defendant said in evidence: "I tried my best to get Otto Dunkels to get rid of the plaintiff." But all this is nothing to the point unless the plaintiff can prove that, in the words of the particulars, the procurement of dismissal was effected through Louis Oppenheimer, by procuring Louis Oppenheimer to tell Otto Dunkels that the plaintiff was not to go to the offices of the Corporation again until the plaintiff and his wife had arrived at a settlement of their differences.

I do not attach final importance to the fact that, according to Louis Oppenheimer and Otto Dunkels, he said to Otto Dunkels only that it was very tactless of the plaintiff to come to the offices of the corporation until the differences were settled. The jury were entitled to disbelieve him and to accept the view that, in effect, Louis Oppenheimer did tell Otto Dunkels on Nov. 13, 1935, or thereabouts, that the plaintiff should not come to his office. The real difficulty in the way of the plaintiff is to show that the defendant ever communicated at all with Louis Oppenheimer on the subject. Mere conjecture will not suffice. On this very material matter the plaintiff gives no evidence. He deposed that Otto Dunkels told the plaintiff, that he (Otto) had seen Louis Oppenheimer in his private room, and that Otto Dunkels had said to the plaintiff that the plaintiff had better give Otto a statement to show that he was not being unreasonable, in order that Otto might show it to Louis Oppenheimer. The plaintiff admits that he refused to give the statement, though he had collected some family letters to be handed to Oppenheimer, and that thereupon Otto Dunkels said to him, "We shall have to part." This was on Tuesday, Nov. 19, 1935. The plaintiff himself says that the refusal to give this statement and to allow Oppenheimer to negotiate between him and his wife was the reason for his dismissal.

Up to the time that Otto Dunkels had seen Oppenheimer, the plaintiff agrees with the defendant that Otto had said that he was not going to be influenced by anything that the defendant tried to persuade him to do. But, after Otto had seen Louis Oppenheimer on Nov. 13, a new situation arose. Otto begged the plaintiff to give him the statement of his case, but the plaintiff refused to do so. Then Otto said that they would have to part. This, it is to be observed, is the plaintiff's own version. The evidence of Otto Dunkels is substantially to the same effect. He says that he first had conversation on the subject with Louis Oppenheimer on Nov. 13, 1935; that he asked the plaintiff for his statement on Nov. 18, which the plaintiff refused; that he again appealed to him on Nov. 19, and the plaintiff again refused; and that he then gave him notice orally, and again by letter on Nov. 26, 1935. In this letter Otto said: "I hereby terminate our association which must come to an end at the end of this year." Louis Oppenheimer declares that the defendant did not know that he (Oppenheimer) was going to speak to Otto Dunkels about the plaintiff, and nowhere in his evidence does the defendant say that he did so know, request or induce.

It follows, therefore, as I have said, that there is no direct evidence that the defendant ever did anything to procure Louis Oppenheimer to act either in the way alleged in the particulars or in any other way at all. The most that can be said is that Oppenheimer admitted that he intervened for the defendant's sake. But Mr. Birkett says, nevertheless, that the defendant has made an admission of this fact, and, if he is right, this admission constituted matter to go to the jury, who would then be entitled upon it to come to the conclusion at which they arrived. Thus, in the sum, in my view, this whole part of the case turns upon the answer to the question of whether the defendant has made such an admission as can properly be used as evidence against him. This alleged admission can be very shortly stated. In the crucial letter of Nov. 16, 1935, to the defendant from Otto Dunkels, which Otto showed to the plaintiff, and in which he sets out the words admitted by the defendant to have been spoken by him, there occurs also this passage:

> You have now persuaded Louis Oppenheimer to tell me that Victor must not come to the office of the Corporation. Again another ban! Mr. Louis Oppenheimer restricted it to the fixed time, i.e., until Dawn and Victor arrived at an amicable settlement. . . . You went further and told me that regardless of the outcome of the negotiations, he must never enter the premises again. I accept your decision, I have told Victor of it, and I will see to it that he does not come to 8, Charterhouse Street again.

The defendant, through his solicitors, refused to answer this allegation, describing it as impertinent. The plaintiff adds that he did not know what steps the defendant had taken with Louis Oppenheimer. Mr. Otto Dunkels says that he used these words under a misapprehension, and that he thought that in all probability the defendant had brought it about, but the jury were entitled to disbelieve him. Thus the very vital problem arises from the fact that, inasmuch as, admittedly, the defendant did not answer nor contradict the allegation, it is said that there is evidence on which the jury may properly consider that he had thereby admitted its truth.

The law on this subject is conveniently, and I think accurately, summarised in TAYLOR ON EVIDENCE, 12th Edn., p. 551, as follows: "There is in general no duty cast upon the recipient of a letter to answer and his omission to do so does not amount to any admission of the truth of the statements contained in it." It may, however, be otherwise when the relation between the parties is such that a reply might properly be expected: per WILLES, J., in *Richards* v. *Gellatly* (18), at p. 131; approved in *Wiedemann* v. *Walpole* (19), where BOWEN, L.J., says at p. 539:

> silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.

LORD ESHER, M.R., says, at p. 538:

> There might be cases in which the court thought that, having regard to the nature

> of the correspondence and the circumstances of it, the not answering one letter in that correspondence did amount to evidence of an admission.

In the present case, after careful consideration, I have come to the conclusion that here, in all the circumstances, it would be wrong to draw any admission from the failure of the defendant to answer this particular matter in Otto Dunkels' letter. Walter Dunkels had never denied that, in general, he wanted Otto Dunkels to dismiss the plaintiff, so that no particular refutation of the matter of Oppenheimer would be called for. A Nor do I find in the letters before us that there was any correspondence on this subject between Walter and Otto Dunkels such as that to which LORD ESHER, M.R., refers. The letters of July 25, July 26, and Nov. 16, 1935, from Otto to Walter, with regard to the plaintiff's position in the B firm, and the letter of July 26, in which Otto describes himself as an "intermediary" between the plaintiff and the defendant, are dealing with specific matters, and do not seem to call for answers. No answers from Walter are in fact disclosed, and, in a matter of so serious a charge of violating legal relations between parties, as is averred in the present C case, in the total absence of any other evidence, I think that it would not be right to allow a jury to draw any admission from a mere failure to answer a letter which, in my view, did not so reasonably call for a reply as to justify any inference being drawn from the absence of such reply. In the words of LORD TENTERDEN, C.J., in *Fairlie* v. *Denton* (20), at D p. 103:

> It is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains.

This seems to be the general proposition, and, in my opinion, there E is nothing here properly to call in the exception, for the plaintiff, in my view, has failed to show that this case is one in which an answer might so reasonably be expected as to make its absence a matter of admission. The fact that the latter of Nov. 16, 1935, alleges such a large number of matters makes it the more dangerous to bind the defendant because of F a failure to answer one of them. As I have said, it does not appear that he answered any of the letters of Otto Dunkels on the subject of the plaintiff, and as, immediately afterwards, he orally learned from Otto what had actually happened on Nov. 13, and learned of Otto's misapprehension as to the defendant's part in influencing Oppenheimer, there G was really no reason why he should be so answered by the defendant with a written denial. I come to the conclusion, therefore, that there is no evidence in this case on which the jury could properly come to the conclusion that the defendant had procured Louis Oppenheimer to tell Otto Dunkels that the plaintiff was not to go to the offices of the Diamond H Corporation, and, therefore, that there is no evidence that the defendant procured the wrongful dismissal of the plaintiff, a dismissal which appears to have been caused, on the plaintiff's own admission, by his refusal to give Otto Dunkels a statement for the consideration of Louis Oppenheimer.

It has been argued that, after the critical letter of Nov. 16 was unanswered by Walter Dunkels as to this matter, the defendant and Otto Dunkels had frequent conversations with one another, and that, though the former had many opportunities of denying that statement, he did not avail himself of such opportunities. The evidence of Otto Dunkels A was to the effect that he had once erroneously imagined that Walter must have expressed his dislike of the Baron, not only to him but also to his co-directors, whom he saw daily, and that, therefore, when Louis Oppenheimer spoke to him, he did so at the instance of the defendant. This opinion of Otto Dunkels, which finds expression in the letter of B Nov. 16 (which afterwards he says was "shown to be erroneous"), is denied by all the evidence and affirmed by none, and does not, in my opinion, amount to anything more than a guess that the dismissal through Oppenheimer may have been brought about by the defendant. I think that it would be improper to treat such a hazard as an element in drawing C any inference against the defendant. Nor do I think it right for a jury to assume that the defendant did use opportunities to put pressure upon Louis Oppenheimer, when no evidence of such pressure exists beyond the defendant's admitted desire that Otto Dunkels should dismiss the plaintiff and the fact that the plaintiff and Oppenheimer were co-directors. D While, of course, if there were evidence, it was a matter for the jury, the request of Oppenheimer that the plaintiff should merely supply him with a statement—with which, had the plaintiff done so, Oppenheimer would apparently have been satisfied—points to an inference, if there is any inference, that Oppenheimer did not actively desire the dismissal E of the plaintiff, and, consequently, that the defendant either did not attempt, or else failed, to move him to exercise his great influence to terminate the plaintiff's employment.

A further argument for the conclusion that there was evidence upon which the jury could act is that the issue was the broad one: Generally, F did the defendant procure the plaintiff's dismissal? I have pointed out why, in my opinion, the plaintiff should be confined to his particulars, and I do not find in the way in which the case was conducted that either counsel or the judge departed from this position. The judge, in his summing-up to the jury, after pointing out that, as regards the pressure G of the defendant on Otto Dunkels, Otto said that he would not dismiss the plaintiff, goes on to say:

> There came another factor into Otto Dunkels' calculations which he had not apparently thought of before. There was Mr. Louis Oppenheimer.

He then gives to the jury the story of Oppenheimer's intervention, H much in the same manner as it has been stated by counsel on each side in this court. He addresses the jury as follows:

> Says Mr. Norman Birkett, has not Mr. Louis Oppenheimer been got at by Walter Dunkels, do you not think? Do you really believe the evidence Mr. Oppenheimer has given? Why should you disbelieve it?

Nowhere do I find any suggestion in the summing-up of evidence that the breach of contract was to be considered as procured through any agency except that of Oppenheimer. Sir Patrick Hastings had said that there was no evidence of inducement, and told the judge that he would argue the point after the decision of the jury. Later, he said :

> The case on the major ground of inducing breach of contract is specified [in the pleadings] with the utmost clarity and precision. We have not, therefore, to wander into many branches of the law which are applicable to different sets of circumstances. A

He cites para. 12 which relates the particulars to which it is now said that the claim is confined, and, in argument, after judgment, again takes the point that mere disbelief of the evidence of Oppenheimer does not make evidence. He relies upon the plaintiff's own case in this matter B as disclosing no cause of action. So also Mr. Birkett, as I read his argument, also treats the matter as being one turning upon whether or not there was evidence that Walter Dunkels persuaded Oppenheimer. He cites the passage from the much-read letter of Otto Dunkels beginning: "You have now persuaded Mr. Louis Oppenheimer," and he asks on C this : "What is a jury going to say ? The jury said, of course he has." Finally, Sir Partick Hastings, in reply, again referred to the following evidence of the plaintiff himself : "I agree that Mr. Dunkels said to me : 'If you will give me that letter (to Oppenheimer) you will not be dismissed, but, if you will not help me, I am going to determine my relationship D with you,'" and asked : "In the face of that, how can it be said that the jury may have disbelieved the evidence ?" Finally, the judge says in his judgment :

> The plaintiff made it quite clear that Mr. Otto Dunkels was putting his dismissal upon the ground that he would not supply the paper which was wanted to be given E to Mr. Louis Oppenheimer.

In the face of these and other citations which I have forborne to mention, I cannot think that the generality of Question 7, which was thus given *sub modo*, prevents the defendant from saying that this part of the case from first to last remained within the particulars of para. 12 F of the statement of claim. The distinction between legitimate inference and mere conjecture is as important to be remembered in considering the presence or absence of evidence to be set before a jury as it is important to be remembered in the case of consideration by the trained mind of a judge. That Oppenheimer was influential, that he frequently met the G defendant, that the defendant may have desired to use him for his purposes, and that the defendant at all times wished the plaintiff to be dismissed, may be very true, but all these considerations are beside the point unless it be proved that he did, in the language of BRETT, L.J., in *Bowen* v. *Hall* (17), "do an act which in law and in fact is a wrongful H act," or "a violation of legal right committed knowingly," as LORD MACNAGHTEN said in *Quinn* v. *Leathem* (16), at p. 510. In my opinion, the cross-appeal should succeed.

SCOTT, L.J. : I have had the advantage of reading the judgments of my colleagues. On the question of slander they do not differ in their final decisions, but on the main issue they are opposed, and I have to give the casting vote. On that I agree with GREER, L.J. In so far as I differ from either of them in my inferences from the evidence, or in my view of the significance of the facts, I will refer to the passages which seem to me important in connection with the particular legal issue to which they are relevant.

I deal first with the slander alleged in para. 7 of the statement of claim: "Victor is a Jew-hater." Sir Patrick Hastings felt himself unable to argue that these words were incapable of a defamatory meaning. Both the senior members of the court agree with Sir Patrick, and so do I. The words seem to me obviously defamatory. To say that a man hates a particular race or class of people is to allege, at the very least, a character which is warped and unlikely to be impartial. But the plaintiff has to get over the *Jones* v. *Jones* (1) fence. Has he cleared it? We are all now in agreement that he has. Discussion took place about *Lumby* v. *Allday* (3), where it was held that an imputation of immorality for the express purpose of causing the plaintiff to lose his employment was not enough to bring him within the rule that the words spoken must relate to the employment. But I cannot see that that case has any effective legal message which is not contained in *Jones* v. *Jones* (1). So far as concerns its application to the "Jew-hater" slander, the *Jones* v. *Jones* rule (1) seems to me to be quite unambiguous, and *Lumby* v. *Allday* (3) seems to add nothing. Had the slander in that case been spoken to the employer, the decision would have thrown light upon ground not covered by *Jones* v. *Jones* (1). But, as I read the report, there was no evidence to that effect.

In order that the plaintiff may have judgment, the essential condition laid down in *Jones* v. *Jones* (1) must be satisfied: where no special damage is proved, the words must have been uttered in relation to the plaintiff's occupation. I do not think, however, that that relation need be expressed. In my view, it is sufficient to satisfy the condition if it is shown that that meaning was, in the circumstances of the case, plainly conveyed by the words spoken. For this purpose, much of the evidence on the procurement issue is, broadly speaking, relevant. Everything the defendant said to Otto Dunkels was said for the deliberate purpose of getting him, as employer, to dismiss the plaintiff from his employment, and at each interview Otto Dunkels knew it, as appears from every word of his letter of Nov. 16. That evidence is, I think, of itself sufficient to show that the words in question were intended by the defendant, and understood by Otto Dunkels, to relate to the plaintiff's employment. In the present case, however, the plaintiff's case is even stronger, for the defendant actually admitted that he used the words in question in relation to the plaintiff's employment. Indeed, he could not do otherwise, as the imputation was one which, if true, was bound to make Otto Dunkels want to dismiss the plaintiff, in the interest of his own business, which was wholly dependent on the goodwill of the men who controlled the Diamond Corporation, who were themselves nearly all Jews.

The following passages, in my view, suffice to justify what I have just said. Mr. Birkett was cross-examining the defendant:

> When did you first say to Otto Dunkels "Victor is a Jew-hater"?—I think that was right at the end.
>
> Why did you say that?—I told him that as being a reason why I disliked him.
>
> Why you disliked him?—Why I disliked him.
>
> You told Otto that. But Otto knew your dislike for him, did he not? You had been saying "Kick him into the street" for months?—I gave Otto Dunkels various reasons why I did not want to see him in my office.
>
> Are the directors of the Diamond Corporation for the most part Jews?—Yes.
>
> And is it the fact, quite naturally, that, if somebody is speaking disparagingly of the Jews, or hating the Jews, he would not be popular with the directors of the Diamond Corporation—obviously not?—I do not think he would—no, of course he would not. He was not popular with me.
>
> If you say of a man who is intimately connected in business with Jews, "That man is a Jew-hater," can you conceive anything more likely to disparage him in the way of his trade?—It had nothing to do with his business at all.
>
> Will you answer the question first and then add anything you wish. You are a Jew?—Yes.
>
> I am asking you, on the basis of the questions which I have put, can you conceive anything more disparaging to a man in his business who deals with Jews than to say, "That man is a Jew-hater"?—I think it is disparaging. I was putting it forward as far as I was concerned as being another reason why I did not want to have any business connection with him at all.

The following quotations show that the Diamond Corporation was practically the sole source from which O. Dunkels & Co. then drew, or could even in the future expect to draw, its income, and that the leading men in it were all Jews. It also shows that many of the clients of O. Dunkels & Co., brought by O. Dunkels & Co. to the premises of the Diamond Corporation there to become customers of the Corporation, were Jews. Otto Dunkels said in cross-examination:

> Is it the fact that, so far as the business of Dunkels & Co. is concerned, many of its clients are Jews?—Yes, several of them.
>
> Would it be right to say—I do not know, and I am asking—that most of them were Jews?—I think so to-day.
>
> Certainly, so far as the Diamond Corporation are concerned, its Board in England was composed wholly of Jews?—Honestly, I am not sure. There are 15 directors, I believe. The leading people, the people whom I approached or mixed with, were Jews.
>
> I am speaking of the English Diamond Corporation and its business here?—It is, yes.
>
> To say of a man in that business, "He is a Jew-hater," would be likely, would it not, to make him an object of hatred to Jews in business?—It would, if it were true.
>
> If it were not true, it was an extremely damaging and disparaging thing to say of a man whose business lay with Jews, was it not?—Yes. I looked upon it as one of those bitter and harsh remarks which the defendant kept on making about the plaintiff.

In my opinion, the jury had ample evidence here on which to find that the words so uttered to the plaintiff's employer were said in relation to the plaintiff's employment—"in the way of his occupation," as alleged in para. 7 of the statement of claim. I therefore agree with my colleagues that the *Jones* v. *Jones* (1) test was satisfied.

In regard to the second slander issue, I agree with SLESSER, L.J., that the plaintiff fails *in limine*, because the words are not, even in the light of all the evidence, capable of a defamatory meaning, so that the question whether they were actionable does not arise. The reason why I take this view is that the words seem to me to mean merely that: "As Victor will never again be allowed to come to the Diamond Corporation's premises, he will no longer be able to render to you the services which made him valuable, and there will be nothing for him to do in your office but the work of an ordinary clerk—and for that he cannot expect more than £500 a year." So interpreted—and the natural meaning of the words seems to me to exclude any other interpretation—I cannot see that the words make any imputation. The jury could not have intended to say that the words "Victor must never enter my premises again" were defamatory, because, in their other answers, they were saying that the words "you ought to turn Victor out," or "get rid of him," were not defamatory. Nor do I see how a defamatory meaning could be imparted to them by any circumstance proved in evidence. On the contrary, the defendant's family reasons for intense estrangement from the plaintiff supply a key which establishes a possible non-defamatory sense. On this second slander issue, therefore, I agree with SLESSER, L.J., that the plaintiff's appeal fails.

On the cross-appeal, which concerns the plaintiff's main cause of action, the plaintiff's case at the trial necessarily fell into two parts. He had to show (i) that Otto Dunkels broke his contract with him, and (ii) that the breach was procured by the defendant. The first issue depended entirely on what the contract was, and on that my colleagues are in agreement, and I agree with them. Sir Patrick Hastings' reason for contending that there was no breach was that, in his submission, the plaintiff had never had anything but a yearly contract, a contract for each calendar year, which, according to its terms, would expire at the end of the year, and would not thereafter continue unless expressly renewed, and, further, that the plaintiff was in fact not dismissed, but was allowed to work out his current term to Dec. 31, 1935, and was accordingly paid down to that date. He supported this legal contention as to the duration of the contract by citing numerous cases on yearly hirings. I do not regard them as relevant, and am content to record my agreement with what GREER, L.J., has said about them. In the present case, there was, in my opinion, ample material in the evidence given, and particularly in the admissions of Otto Dunkels, to show that the oral agreement made in Jan., 1929, was not a yearly hiring at all, but a long-term contract of indefinite duration, extending beyond the then current year, and not terminable by reference to any particular annual or other date. Indeed, I think that there was some evidence upon which it was open to the jury to reach the conclusion that the agreement was for an employment to last as long as Otto Dunkels' business lasted, almost like a partnership, although, as the oral bargain did not contain any express term to the above effect, the mutual right to terminate the relationship upon reasonable notice would necessarily be implied.

As both my colleagues have dealt fully with Sir Patrick's legal argument, and have also analysed the evidence about the oral agreement, I do not propose to say more than that I agree also with their conclusion that the plaintiff's contract could not be terminated except upon reasonable notice, and that, in the circumstances, it was open to the jury to say that a notice, given on Nov. 19, to quit the service on Dec. 31, fell far short of what was a reasonable length of notice. Their answer to Question 6 covers all that was necessary to establish the first part of this cause of action.

On the second part, I confess that I have felt the force of the critical analysis by Slesser, L.J., of the evidence, in his search for some definite and categorical piece of testimony that the defendant did really bring about the plaintiff's dismissal. But, on reflection, I think that he has been expecting too much, and that there is sufficient evidence, either direct or circumstantial, to justify the jury's verdict. Question No. 7 to the jury was:

> Did the defendant induce and procure Otto Dunkels to commit a breach of his contract with the plaintiff ?

That form of question was wide, but it was common ground on the appeal that the issue throughout the trial was whether the defendant did effect the procurement and inducement by the means alleged in para. 12 of the statement of claim and the particulars delivered thereunder, to which my brethren have referred. I do not differ from my brethren in the view that the plaintiff could not succeed unless he did in fact prove that those means were adopted by the defendant. I agree that the answer of the jury to Question 7 imports affirmation of the plaintiff's particulars, and that the relevant question for our decision is, therefore, whether there was sufficient evidence to justify such a finding. On this, one has to remember, first, that, in a case like the present, the very nature of the subject-matter makes it unlikely that direct evidence of the exercise by the defendant of pressure upon Louis Oppenheimer would be forthcoming, and that resort to inference from circumstantial evidence is almost inevitable, and, secondly, that, wherever the demeanour of the witness was capable of affording guidance to the judge, it is right to assume that he had it in mind when he held that there was sufficient evidence to support the jury's verdict.

On the probabilities of the case, the way the jury answered the questions on the alleged slanders is not without significance in considering the circumstantial evidence bearing on the issue of procurement. Before framing these answers, they had oviously made up their mind in favour of the plaintiff on the main issue, and had decided to give him large damages on that. The smallness of the sums awarded on the two slanders where the plaintiff succeeded is a plain indication that they regarded those slanders simply as steps in the defendant's campaign to get the plaintiff turned out, for which they had already decided to give full compensation. Their refusal to treat the alleged slanders (i), (ii)

and (iv) as defamation equally points to the same conclusion: (i) I am not interested in Dunkels & Co. or their clients' business so long as Victor is in your employ; (ii) you ought to turn Victor out; (iv) you ought to get rid of Victor at once. Having before them evidence that Louis Oppenheimer was the managing director of the Diamond Corpora-
A tion, and that his lightest word was final, that the defendant was a leading director, and that those two met at lunch every day, they did not need much positive evidence to warrant the conlcusion that the pressure Louis Oppenheimer put on Otto Dunkels was at the instigation of the defendant. There was, I think, sufficient positive evidence for
B that purpose. I do not doubt the view submitted by Sir Patrick Hastings that the mere omission of the recipient of a letter to deny a charge made in it does not, of itself and by itself, make the written allegation evidence of the fact alleged. But few such unanswered letters stand in isolated detachment, and surrounding circumstances or particular facts, often
C make the omission to answer a matter which calls for explanation. Where this is so, an inference may be justifiable. In such circumstances, a presumption of fact is raised, and the onus shifts. In *Wiedemann* v. *Walpole* (19), the question was whether a failure by the man to answer a letter from the lady alleging a promise of marriage was corroboration
D within the statute. It was held that it was not, but all three members of the Court of Appeal said that there might be circumstances in which the failure to answer might amount to an admission. BOWEN, L.J., said, at p. 539:

> Silence is not evidence of an admission, unless there are circumstances which
> E render it more reasonably probable that a man would answer the charge made against him than that he would not.

That appears to me good sense, and it is in substance the principle laid down by WILLES, J., in *Richards* v. *Gellatly* (18), at p. 131:

> It seems to have been at one time thought that a duty was cast upon the recipient
> F of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded and the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected.

KAY, L.J., said, at p. 541:

G

> The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission.

In the present case, I think that there was enough "in the relations of
H the parties" for the jury to infer that the defendant, in his conversations with Otto Dunkels after receiving the letter on Nov. 16, 1935, and before the dismissal of the plaintiff, on Nov. 19, either did actually admit that he had "persuaded Mr. Louis Oppenheimer to tell me that Victor must not come to the office of the Corporation," or, if he made no reference to that allegation, that he would have denied it had it not been true. Had

Louis Oppenheimer really acted on his own initiative, independently of the defendant, the latter would, in my opinion, almost certainly have informed Otto Dunkels of that fact at the interview upon the letter. It would have strengthened his hand, in his design of getting Otto to turn the Baron out, if he could have told Otto that the great Louis Oppenheimer had acted entirely of his own motion in the matter, because it would have supplied Otto with an additional reason for thinking that his own business interest made that course expedient. On this point I refer to where Otto admitted to Mr. Birkett that, if relations with the Diamond Corporation were broken off, he could not possibly do any more business. At any rate, the jury were, I think, entitled, on what I have already said about the facts, to take the sort of view I have indicated—namely, that, in the circumstances of the case, there were grounds for inferring that the defendant did really admit to Otto the truth of the statement about Louis Oppenheimer in Otto's letter. But that is not quite all. There is, I think, some evidence outside the letter bearing upon the action of Louis Oppenheimer. The plaintiff's competence in the work he did for Otto Dunkel's firm at the Diamond Corporation was not disputed, and, down to a date subsequent to Nov. 6, when the letter from the plaintiff's solicitors was sent to his wife with a view to an agreement about their son, relations between the plaintiff and Louis Oppenheimer continued to be " very cordial, very friendly and very good." On Nov. 13, Louis Oppenheimer intervened directly with Otto Dunkels. I quote from Otto Dunkel's evidence :

> I gather from your evidence that what Mr. Louis Oppenheimer said was " that Baron should not come here until the domestic matter is settled."—He put it differently. He said he thought it rather tactless of the Baron to keep on coming to the offices of the Diamond Corporation, and he thought it would be better. He put it very mildly, but, coming from Mr. Louis Oppenheimer, naturally I felt I must do something about it.

Later, Otto Dunkels volunteered this answer :

> I knew that my cousin was more and more highly incensed against the Baron. I imagined that he must have expressed his dislike of the Baron, not only to me but more so to his co-directors, whom he saw daily at the luncheon table, and so forth. Therefore, when Mr. Louis Oppenheimer spoke to me on the Wednesday, I thought he did so at the instance of my cousin, but I have since been told that he did not. Mr. Louis Oppenheimer did not say he did so at the instance of my cousin. He simply made that casual remark " I do think it is very tactless," etc.
>
> That is to say, after this intervention, in Nov., 1935, for the first time by Mr. Louis Oppenheimer, you thought : Well, in all probability the defendant, Mr. Walter Dunkels, more highly incensed than ever, has brought this about ?—Through conversation, not actually asking him : " Please do this thing for me and speak to Otto Dunkels."
>
> No, but that he had brought it about. You thought the facts looked to you as though " the defendant has not merely spoken to me about it but he has not spoken to Mr. Louis Oppenheimer " ?—Yes.
>
> When Mr. Louis Oppenheimer intervened, you felt, " Now I must try and do something " ?—Yes.

Later again, there is this question and answer :

> I do not want you to misunderstand me. I am not suggesting, and I do not think I could, that you put improper pressure ; I would not use that word of you, but did it occur to you that the attitude of Mr. Louis Oppenheimer, as you have

described it, and the continued attitude of Mr. Walter Dunkels over these domestic matters was really bringing an improper pressure upon the plaintiff about his domestic affairs ?—It struck me as so. That is why I was so anxious to resist it, not so much as coming from Mr. Oppenheimer, because Mr. Oppenheimer never said one unkind word about the Baron ; on the contrary he always said he liked him personally.

Then Mr. Louis Oppenheimer gave evidence. The passage in the letter A was put to him in cross-examination, and he denied that he had been persuaded by the defendant, but later he gave this evidence :

And this is right, is it not, that, had it not been for this unhappy difference between his wife and him about the boy, you would never have intervened at all?—Never.

It did not concern you, it concerned Walter ?—That is it.

B And it was for Walter that you intervened ?—I intervened for his sake. Yes.

Later, Mr. Louis Oppenheimer gave this evidence :

Had you the power to forbid him the premises ?—Yes.

You had, but Mr. Walter Dunkels had not ?—He had not.

Later in his evidence, he said :

C But did you not know that the solicitors had intervened ?—It never occurred to me.

I will tell you why I put it to you, because I do not want to trap you or catch you in any way. Mr. Walter Dunkels said this in evidence when he was cross-examined by me. I said : " Did Mr. Louis Oppenheimer know that the plaintiff was then in the hands of solicitors and that you were determined to prevent it if you could ? " He made answer : " He knew that the plaintiff had put the matter D into the hands of the solicitors." Then I asked : " You told him ? " He replied : " Obviously." Then I put : " Was it not in consequence of that that Mr. Oppenheimer intervened ? " Mr. Walter Dunkels, you see, was saying that he had told you that the Baron had put his affairs into the hands of solicitors when he spoke to you about it ?—I do not remember it."

In addition to these passages, the jury no doubt had in mind the way in E which Sir Patrick Hastings had put the intervention to Louis Oppenheimer to the plaintiff in cross-examination. In the course of the evidence, there occurs this passage, beginning with a reference to the letter from the plaintiff's solicitors to the Baroness :

Did Otto Dunkels, after that letter, either send for you or come and see you— F I am not quite sure which—and have a talk to you about it ?—Yes.

I want to see what was said about that. Did he tell you that for months past Mr. Walter Dunkels had been taking up the position that he wanted Otto to get rid of you out of his business ?—Yes. He had told me that already before, on many, many occasions.

Did Otto tell you that he had refused to do what Mr. Walter Dunkels asked him ?—Yes, he said so.

Did he then tell you that he had heard from another member of the Diamond G Syndicate, Mr. Louis Oppenheimer ?—Yes.

He was another gentleman, was he not, whom you would have to see when you went to the office of the Syndicate, if you did not see Mr. Walter Dunkels ?—Yes. Managing director, he was.

Did Otto Dunkels tell you that Mr. Louis Oppenheimer had sent for him ?—He did not say exactly that, but he said he saw Mr. Oppenheimer in his private room.

H Did he say that Mr. Louis Oppenheimer had said to him that it was very tactless of you to be continually coming to the office " when he knows the strained relations between himself and Mr. Walter Dunkels " ?—Yes. In fact, Mr. Otto Dunkels was very distressed with it.

I am only putting the conversation to you. You will have every opportunity of saying anything you want to. Did he say that Mr. Louis Oppenheimer had said that he thought it would be much better if you did not go to the office of the Corporation for a time ?—Yes, until differences between my wife and myself were settled amicably.

The jury saw the witnesses, and judged of their demeanour in cross-examination, and were entitled to believe or disbelieve, as they thought right, and, in my view, it is impossible for us to say that the judge was wrong in refusing to hold that there was no evidence upon which the jury could find that the defendant had procured the wrongful dismissal of the plaintiff. My conclusion on the plaintiff's appeal is that he succeeds with costs on the slander alleged in para. 7 of the statement of claim and that he fails on para. 9, and that the cross-appeal should be dismissed. As regards costs, I think that the appellant should have the costs of the appeal, but that no order should be made as to the costs on the slander issues below. On the cross-appeal, the plaintiff, as respondent to that, should have his costs of the appeal. The general costs of the action in the court below should be given to the plaintiff.

Appeal allowed to the extent of £100 *with costs. Cross-appeal dismissed with costs. Leave to appeal to the House of Lords.*

Solicitors: *J. D. Langton & Passmore* (for Baron de Stempel); *Wordsworth, Marr Johnson & Shaw* (for Major Dunkels.)

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

KNIGHT SUGAR COMPANY, LTD. *v.* THE ALBERTA RAILWAY & IRRIGATION COMPANY.

[Privy Council (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Wright), **November 25, December 16, 1937.**]

Sale of Land—Merger of contract in conveyance—Registered land—Whether contract merged in transfer—"Coal and other minerals."

Land in Alberta, held under Crown grants which contained a reservation of all coal mines, coal pit seams, and veins of coal, and the right to work the same, was contracted to be sold, subject to the conditions and reservations expressed in the original Crown grant. The transfers executed for the purpose of the registration of the purchaser as the owner of the land contained an exception of all coal and other minerals and the right to use so much of the land as might be considered necessary for working and removing the coal and minerals. The certificate of title subsequently issued to the purchaser contained the words "excepting thereout all coal and other minerals." It was contended that the rule that the agreement for sale was merged in the conveyance did not apply to a transaction restricting registered land, and that the word "minerals" as here used must be construed to mean minerals of the same genus as coal, and did not include petroleum and natural gas:—

Held: (i) the agreement for sale was merged in the transfer, which must be taken, in the case of registered lands, to represent the conveyance in the case of unregistered land.

(ii) the words "coal and minerals" could not be restricted as suggested, and meant all minerals.

[EDITORIAL NOTE. It is well known that for practically all purposes the agreement for sale cannot be looked at after the execution of a conveyance, since the agreement is merged in the conveyance. In the case of registered land, there is, properly speaking, no document which is a conveyance of the property, but a transfer is executed, and the registration of the purchaser as the owner of the property, in accordance with the terms of the transfer, operates to vest the property in him. Upon these grounds, it was argued that the doctrine of merger did not apply as between the agreement and the transfer, but their Lordships have decided that it does.

As to Merger, see HALSBURY, Hailsham Edn., Vol. 10, p. 265, para. 331; A and for Cases, see DIGEST, Vol. 17, pp. 340-342, Nos. 1515-1539.]

Cases referred to:

(1) *Leggott* v. *Barrett* (1880), 15 Ch. D. 306; 17 Digest 340, *1515*; 51 L.J.Ch. 90; 43 L.T. 641.

(2) *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351; 17 Digest 340, *1516*; 53 L.J.Q.B. 348; 51 L.T. 211.

B (3) *Hansen* v. *Franz* (1918), 12 Alta. L.R. 406; *revsd. on app.* (1919), 57 S.C.R. 57.

(4) *West* v. *Read* (1913), 13 S.R. N.S.W. 575; 38 Digest 755, case *p*.

(5) *Glasgow Corpn.* v. *Farie* (1888), 13 App. Cas. 657; 34 Digest 604, *12*; 58 L.J.P.C. 33; 60 L.T. 274.

(6) *Barnard-Argue-Roth-Stearns Oil & Gas Co., Ltd.* v. *Farquharson*, [1912] A.C. 864; 34 Digest 604, *55*; 82 L.J.P.C. 30; 107 L.T. 332.

C (7) *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.*, [1911] A.C. 290; 34 Digest 606, 36; 80 L.J.P.C. 128; 104 L.T. 657.

(8) *Dome Oil Co.* v. *Alberta Drilling Co.* (1916), 52 S.C.R. 561.

Appeal from a judgment of the Appellate Division of the Supreme Court of Alberta (Harvey, C.J.A., Clarke, Lunney, Ewing, and D McGillivray, JJ.A.), dated Feb. 28, 1936, affirming a judgment of the Supreme Court of Alberta (Ford, J.), dated Sept. 13, 1935. The facts of the case are set out in the judgment of their Lordships, delivered by Lord Russell of Killowen.

A. Macleod Sinclair, K.C., *Stanley Rees*, and *W. H. Epstein* for the E appellants: By the terms of the agreement of Nov. 25, 1903, the appellants were and are entitled to the mineral rights other than coal, and the real transaction between the parties is to be found within the terms. Upon the true construction of the words of the transfers, the mineral rights other than coal, or alternatively the petroleum and natural gas F rights, were transferred to the appellants. Petroleum and natural gas are not minerals "like coal." [Counsel referred to *West* v. *Read* (4), *Glasgow Corpn.* v. *Farie* (5), *Barnard-Argue-Roth-Stearns Oil & Gas Co., Ltd.* v. *Farquharson* (6), *Caledonian Rly Co.* v. *Glenboig Union Fireclay Co.* (7), *Dome Oil Co.* v. *Alberta Drilling Co.* (8).]

G *W. N. Tilley, K.C.*, for the respondents, was not called upon.

Appeal dismissed with costs.

Lord Russell of Killowen: In this appeal from a judgment of the Appellate Division of the Supreme Court of Alberta, which affirmed H the dismissal by Ford, J., of the appellants' action, the relevant facts are not in dispute. By an agreement dated Nov. 25, 1903 (referred to hereafter as the sale agreement), the Alberta Railway and Coal Company, who were predecessors in title of the respondents, agreed to sell, and the appellants agreed to purchase, certain large parcels of land in Alberta, amounting in extent to over 223,000 acres. The land was held by the vendors under Crown grants, which contained a reservation of coal, the certificates of title issued to them under the Land Titles Act containing a reservation unto His Majesty, his successors, and assigns, of all coal mines, coal pit seams, and veins of coal, and the right to work the same.

Under the sale agreement, the purchase price of $446,249 was payable with interest in ten instalments, the first on the date thereof and the final instalment on Sept. 1, 1912, and the vendors covenanted, on the A payment of the purchase price and interest, to convey and assure to the appellants by a good and sufficient deed in fee simple the said parcels of land freed and discharged from all encumbrances, but subject to the conditions and reservations expressed in the original Crown grant.

Notwithstanding that the sale agreement entitled the appellants to B completion of the contract only on payment of the whole purchase money and interest, the appellants from time to time during the years 1904-1913 resold portions of the lands to other purchasers, and the respondents at the request of the appellants from time to time assured the lands so resold either to the appellants or to their sub-purchasers. In the result, C the whole of the purchase money and interest had been paid by the appellants, and the whole of the land conveyed away by the respondents, by about the end of Mar., 1913. In other words, completion as to all the land comprised in the sale agreement had taken place by that date.

All the documents relating to these assurances have not been placed D before their Lordships, but a few have been selected as samples of the bulk. From these it would appear that the transfers executed by the respondents all contained an exception in the following terms:

> excepting therefrom all coal and other minerals in and under the said land and the right to use so much of said land or the surface thereof as the company may consider E necessary for the purpose of working and removing the said coal and minerals.

It would further appear that the certificates of title subsequently issued, under the Land Titles Act, to the new owners contained the words, "excepting thereout all coal and other minerals."

The entire transaction having been closed early in 1913, apparently F to the satisfaction of all concerned, nothing further occurred between the parties in relation thereto until more than 17 years later. The appellants then for the first time raised the contention that they were entitled to all minerals under the lands other than coal, and this alleged title they eventually sought to enforce in the present proceedings. G

Their Lordships observe at the outset that there is no claim to rectify the documents of transfer by the respondent to the appellants upon the footing of any mutual mistake. The difficulties in the way of establishing the right to such relief in the present case are sufficiently obvious. Their claim to all minerals other than coal was put before their Lordships in H the following way: It was said that, upon the true construction of the sale agreement, the minerals other than coal were included in the parcels sold, that, upon the signing of the sale agreement, the vendors became trustees for the purchasers of the parcels sold, and their right as purchasers of minerals under the contract still continues to exist, because the doctrine under which a contract for the sale of land is merged in the conveyance on completion cannot apply where completion takes, as here, the form, not of a deed of grant, but of a transfer of land, registered under the Land Titles Act, which, it is said, is merely an order to cancel an existing certificate of title and issue a new one in the purchasers' name.

The appellants also raised a subsidiary claim—namely, that, upon the true construction of the transfers and certificates of title, they were entitled to all minerals which were not minerals of the same class as coal, and that they were accordingly entitled to the petroleum and natural gas rights. It was admitted that petroleum and natural gas came within the definition of "minerals." Their Lordships now proceed to consider these contentions.

They can see no foundation for the subsidiary claim last-described. It would appear to depend upon some attempted application of what is known as the *ejusdem generis* rule. The words are clear. They are identical in transfers and certificates of title. What is excepted in each is "all coal and other minerals," words which mean grammatically "all coal and all other minerals." All minerals are therefore excepted, and there is no room for the inclusion in the transfers or certificates of title of any *genus* of mineral. Even if the word "all" is to be restricted in its application to the word "coal," it would still be impossible to construct out of the single ingredient "coal" a *genus* of minerals to which the succeeding general words could be confined.

As regards the major question, there can, their Lordships think, be no doubt that the true construction of the sale agreement would not warrant an exception in the transfer of any minerals except coal. But it is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed: *Leggott* v. *Barrett* (1). The most common instance, perhaps, of this merger is a contract for sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied. There may, no doubt, be provisions of the contract which, from their nature, or from the terms of the contract, survive after completion. An instance may be found in *Palmer* v. *Johnson* (2), in which it was held that a purchaser could, after conveyance, rely upon a provision of the contract and obtain compensation. The foundation of this decision was that, upon the construction of the contract, the provision for compensation applied after completion. In other words, the parties did not intend it to be performed by the subsequent deed, and it was therefore not satisfied by, or merged in, that deed.

There can be no question, in their Lordships' view, that, so far as parcels were concerned, the parties in the present case intended that the provisions of the sale agreement should be performed by the transfer and the subsequent certificate of title, and that, accordingly, subject to a point next to be mentioned, the real contract as regards parcels is to be found, not in the executory agreement, but in the completed transaction.

It was suggested, however, that this doctrine can have no application to the case of the sale of land to which the Land Titles Act, 1906, of Alberta applies, and this on the footing adopted by BECK, J., in *Hansen* v. *Franz* (3)—namely, that a transfer of land under that Act is nothing more than an order to the registrar to cancel the existing certificate of title and to issue a new certificate. Their Lordships are unable to accept this view. Sects. 50 and 51 of the Act are in the following terms:

> 50. After a certificate of title has been granted for any land, no instrument shall be effectual to pass any estate or interest in such land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money, unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.
>
> 51. So soon as registered, every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument.

From the language used in these sections it seems clear that each of the transfers was a document prepared (and prepared, it cannot be doubted, in a form approved by both transferor and transferee) in order that, when registered, it should become operative according to the tenor and intent thereof, and should thereupon transfer the land mentioned therein. It is the transfer which, when registered, passes the estate or interest in the land, and it appears, for the purpose of the application of the doctrine in question, to differ in no relevant respect from an ordinary conveyance of unregistered land. Their Lordships will humbly advise His Majesty that this appeal should be dismissed The appellants will pay the respondents' costs.

Appeal dismissed with costs.

Solicitors: *Lawrence Jones & Co.* (for the appellants); *Blake & Redden* (for the respondents).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

IN THE ESTATE OF BOHRMANN, CÆSAR AND WATMOUGH *v.* BOHRMANN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **November 30, December 1, 2, 3, 7, 15, 16, 17, 20, 21, 1937.]**

Will—Testamentary capacity—Testator a paranoid psychopath—Insane delusion affecting one clause of last codicil—Pronouncement for all dispositions deleting the one clause.

The testator made his will on Nov. 26, 1926, and subsequently executed four codicils, the last in 1932. The bequests were quite ordinary ones to relatives, servants and charities. The codicil of 1932 declared in clause 2 that the gift to charities should be read as if the word " England " had been deleted therefrom and the words " United States of America " substituted therefor. The evidence showed that the testator did not enjoy the best of health and often treated his relatives in a harsh manner. He had, however, at all times been a man of exceptional acumen in managing his private affairs, which chiefly concerned the investment of his capital in stocks and shares. In the last years of his life he was clearly suffering from a delusion that the London County Council were acting improperly in order to dispossess him of his house, which the council desired to acquire for hospital purposes. It was found as a fact that the testator was suffering from a delusion—that he was a paranoid psychopath—at the time the codicil was made in 1932, but that the only testamentary disposition affected thereby was the substitution of the words " United States of America " for " England " referred to above :—

HELD : the will and codicils were valid testamentary dispositions except clause 2 of the codicil of 1932, which should be deleted therefrom.

[**EDITORIAL NOTE.** The court was here invited to say that there are people who cannot be said to be suffering from delusional insanity but are incapable of making a will. Such a decision is held to be beyond what the authorities support. The case, however, is principally of interest in that it is the first time the court has, in a case of delusional insanity, declared for a testamentary disposition subject to the deletion of one clause therefrom. A declaration to this effect has here been made, upon the ground that it was only that clause which was affected by the delusion.

AS TO TESTAMENTARY CAPACITY AND DELUSIONAL INSANITY, see HALSBURY, 1st Edn., Vol. 28, Wills, p. 534, para. 1052 ; and FOR CASES, see DIGEST, Vol. 33, pp. 144-146, Nos. 216-238.]

Case referred to :

(1) *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549 ; 33 Digest 143, *204* ; 39 L.J.Q.B. 237 ; 22 L.T. 813 ; *subsequent proceedings* (1871), L.R. 11 Eq. 472.

PROBATE ACTION in which the plaintiffs, William Robert Cæsar and Cyril William Watmough, propounded a will and four codicils of Alexander Henry Louis Bohrmann, who died on Aug. 3, 1933, a bachelor, aged 51 years, leaving estate estimated to be of the value of £180,000. The defendant, Mr. John Louis Philip Back, contested the will and codicils on behalf of himself and other next-of-kin, alleging that the deceased suffered from insane delusions and obsessions, which rendered him incapable of making a will, and counterclaiming an intestacy. The attack upon the will and codicils was supported by evidence of violent and unreasonable behaviour towards his relatives, and, in particular, of harsh treatment of his mother, it being said that he acted in a perfectly heartless manner at the time of her death. The evidence that principally influenced the decision in the case, however, was that of an obsession against the London County Council immediately before his death. The facts of this are fully dealt with in the judgment.

D. N. Pritt, K.C., and *H. W. Barnard* for the plaintiffs.

Roland Oliver, K.C., *Clifford Mortimer*, and *F. S. H. Bryant* for the defendant, John Louis Philip Back.

LANGTON, J.: The testator was born in 1882, and died on Aug. 3, 1933. His father had predeceased him in 1927, and his mother in 1928. The father had been a prosperous merchant in England, and had died possessed of a very considerable fortune. Practically the whole of that fortune had come into the hands of the testator on the death of the mother in 1928, and it is material to observe that the father had left two-thirds of his money to his wife for life, and one-third to his son. The son himself, the testator, had an independent fortune which he had nursed with some care during his life, although he had never been engaged for any considerable time in an industrial pursuit or in an earning capacity. He appears to have had a remarkable flair for business matters and great acumen in the matter of investment, and he was in the position of being comfortably off before he obtained the very large accretion of wealth which came to him upon his father's, and, ultimately, his mother's, demise. In all, his estate has realised the sum of about £180,000. This estate he has disposed of in a will and four codicils. The lines of attack are these: This man was so incapable of human affection that he was quite unable to appreciate the claims, and the natural claims, that would be dictated by any form of relationship or family sentiment. It has been developed in this way by the defendants: "It is true that we, the relatives, who come to say this thing, are but cousins in the first or other degrees. It is true that it is difficult to say—perhaps impossible to say —what is the degree of affection or sentiment which can be said to be appropriate, fitting or necessary for making a will, when the claims of such relations as that are the only family claims to be considered. But we are in a position to show, not merely that he ignored us and ignored our family claims, giving us merely derisory bequests from a large fortune, but also that this man can be shown to be devoid of the ordinary sentiments of affection of mankind, in that he treated both his father and his mother exceedingly badly, more especially his mother, who had devoted a great portion of her life and time to him, and whom he repaid with every kind of contumely and insult." The other line of attack has been a much simpler and more direct attack—namely, that this man suffered from a quite discernible delusion. He suffered from the delusion that he was being persecuted by the London County Council, and especially by a valuer named Hunt, who had a private grudge against him, based upon a somewhat shadowy suggestion of an attack in childhood. If, indeed, the testator really thought that the London County Council were acting, in allowing themselves to be persuaded to dispossess him of his house, merely because Mr. Hunt, the valuer, had a private grudge against him, I think there could be no possible doubt at all that he was the victim of a delusion. Lest I fail to remark upon it later on, I would stay to consider the action that the London County Council took. The council were concerned to take over, for the purposes of a hospital a large portion of private property of which the testator's life-long home, 99, Denmark Hill, formed a part. It was, I suppose, inevitable that they should go gradually about their work, and it is true to say that, instead of installing the hospital upon this site at once, with all the appurtenances, they were obliged to go—anyway, they thought it wiser to go—by stages. They acquired Mr. Bohrmann's house only for the minor purpose of housing their own hospital staff. This seems to have excited extra anger and spleen upon the part of the testator, who was, on any reading of this case, a most eccentric and unreasonable man. But, again, since the reputation of the London County Council (which can no doubt take care of itself) has been to a certain extent aspersed, I think that it is only fair to that body to state what they actually did do in their treatment of Mr. Bohrmann. I can trace no suggestion of unreasonableness in their action, nor any lack of consideration. Passing by way of their ordinary stages of a notice to treat and valuation and determination of the amount to be paid—as to which let me say in passing that I find no great grievance even on the part of Mr. Bohrmann—they in fact gave him notice to leave by the end of 1932. Mr. Bohrmann was at that time most undoubtedly a sick man. He had suffered throughout his life, rather less, I think, than he imagined, from asthma. In this year, 1932, he began to suffer from other complaints as well. But, putting his plea mostly upon his asthma, as I understood it, or upon some bronchial trouble of the kind, he asked for an extension of time, pointing out that it was hard to turn him out in the middle of winter when he was a man who could ill face the rigours of the English climate at that time. The London County Council do not appear to have been at all deaf or insensible to this appeal, and extended his time to March, but by that time Mr. Bohrmann had become so convinced of the vendetta against him that he began to be far more interested in his battle with the London County Council than in anything else in his life, more interested indeed than he was in prolonging his own life. Working with this one object of defeating the London County Council, he put in a further plea, to be allowed to remain till June. That plea, again, was granted, and it is difficult to see how any body can blame the London County Council for being inconsiderate.

The greater portion of the evidence was directed to his incapacity for human affection and his studied neglect and hatred of all his relations Upon all the reliable evidence in the case, he was a man of very few friendships He was a man who gave very little in life, and got very little out of life. It is difficult to find in the whole of his history any individual upon whom he lavished any kind of affection. He was not in any sense a kindly or an affectionate man. It is undisputed that on the smallest provocation he gave way to fits of really ungovernable rage upon trivial matters. I shall come in detail later to his treatment of his mother and father, but, taking it quite broadly, he was not a man of friendships, and not a man who exhibited any affection for anyone. He was a very spoilt child. In addition, he suffered—I think the medical evidence establishes this—from some form of hypochondriasis, though just how far he suffered it might be difficult to say. He had, as a legacy from the childish complaint of whooping cough, chronic asthma. But his principal medical adviser during his life, Dr. Batten, is not of opinion that this asthma was really so advanced, or of so intense a character, as to be disabling. The disability from which he suffered, the asthma, was largely of his own making, but he was so convinced of his disability that he never for any length of time engaged in active business pursuits, and, although for a time he ran a cattle farm, he was not personally active on the farm for any considerable period of time. His own view of his complaint of asthma dominated the whole of his life. He had, as I think is fairly established by the evidence, the curious idiosyncracy of thinking that he knew a great deal better than his doctor how to deal with his asthma, and some of the treatment which he followed on his own prescription no doubt accentuated his complaint exceedingly. He would spend hours together in over-heated rooms, without any air being admitted to the rooms at all, and he would sit up, either all night or during portions of the night, and deny himself the great advantages which he would probably have obtained from air, exercise and a normal occupation. He allowed himself to become unreasonably angry over trifles, and this, again, was not helpful to his complaint, which is always partly a nervous complaint, as I understand it. He was extremely opinionated, and in all matters of debate expended a quite unnecessary amount of nervous energy in assertions and asseverations which were rarely susceptible of proof. One has to see whether that man, when one comes down to the details of his life, can be said to be a man whose testamentary dispositions are invalid by reason of any mental instability.

First of all, it is interesting to peruse these dispositions, in order to see just how far it is true to say that he was incapable of human instincts and affections, and that this incapacity made it impossible for him to appreciate, as he ought to have appreciated, the claims of his kindred. The first thing that strikes me on perusing these documents is that, in every single one of them, at least one of his relations is mentioned. Of course, it will be remembered that the English law is, and always has been, very strongly in favour of any will or codicil which in terms is not unreasonable and shows no sign of mental deficiency, and the law will not tolerate that it should be replaced or destroyed by any decision of the courts unless it is clear that the testator was incapable of making a proper will. The will in this case is dated Nov. 26, 1926. After the appointment of the executors, the very first thing he does is to give to his cousin Adolphus Charles Henry Back £1,500, and to another cousin, Louisa Back, £500. He then goes on to give legacies to a friend, a Mr. Paqualin—it is rather noticeable that there is only one friend—and to certain very estimable charities. He leaves a little money to the vicars of two parishes, and makes the quite usual bequests to his employees. The point I am stressing at the moment is that the relations are not altogether omitted. The first codicil is mainly concerned with details, and the cousins appear in only one paragraph, in which the cousin Adolphus Charles is given his guns and firearms. A certain portion of the attack on this line, however, is directed to his treatment of his farm animals, and he certainly seems to have taken some rather odd decisions concerning the animals. It is a little noticeable, though, that here in 1926 he makes special provisions as to his farm animals that they should be painlessly killed instead of being sold alive. He says, as to his pet animals, that:

> they should be painlessly killed except any such as friends or employees of mine will accept as gifts, conditional upon their undertaking to keep and treat such animal or animals as well as when in my care.

It is difficult, upon reading a clause like that in a special codicil specially introduced, to believe that this man had any unreasoning hatred of animals of any kind, either male or female, or that he was devoid of the natural human instinct which is there very strongly prominent.

Take now the codicil of 1929. He revokes the two pecuniary legacies in his will, £1,500 to Adolphus Charles and £500 to Louisa Back, but he gives the following further legacies:

> To my cousin John Back £750 and all, if any, shares belonging to me at the time of my death in the Anglo-International Bank, Ltd. To my cousin Adolphus Charles Henry Back, £750 and all, if any, shares belonging to me at the time of my death in the Anglo-South American Bank, Ltd.

He then makes a bequest to a domestic servant. In the codicil of 1931, he revokes the £750 to his cousin John Back, showing, it may be, a somewhat fickle temperament, but certainly not necessarily a temperament governed by an unreasoning hatred. He then goes on to give to his cousin Mrs. Elizabeth Christine Stennebruggen Back, who had devoted a great portion of her time to his comfort, a legacy of £500. He also gave Mrs. Elizabeth Back an annuity of £100 during her life. Finally, by his codicil of 1932, he increases the annuity to Mrs. Elizabeth Stennebruggen Back from £100 to £240, and it is a matter worthy of comment that, however small these bequests may be, having regard to the comparatively immense size of his fortune, there is not one of them in which the relations are not—one relation, at least, is not—considered. They are not omitted altogether.

All the evidence tends to show that this was a most eccentric, very unreasonable, very spoilt, and rather useless human being. Up to that point, when all these witnesses had been called, there was the usual darkness as to how far any of that evidence could be said to take this man out of the category of the sane into that of the insane. There have been called two doctors who saw him and treated him. There was Dr. Batten, who was the physician of the family for a long time, and there was Dr. Banbury. Dr. Batten impressed one at once as a physician of A the old school, who knew his business and was thoroughly dependable and trustworthy. He did not at all convince me, however, that at any period of his life he, Dr. Batten, had come to the conclusion either that Mr. Bohrmann was unable to conduct his own affairs with great clearness and perspicuity, or that he, Dr. Batten, had really come to the con- B clusion that there was any need or justification for restraint. Dr. Banbury, on the other hand, came in at quite a late stage. I am afraid I was a little impatient with him at the end, because I could not get him to direct his mind to the class of question I was putting to him, but there was no doubt at all left in my mind that in 1933 he considered Mr. C Bohrmann to be across what Dr. Gillespie called the borderline, and to be a man who, if his physical health justified it, ought to have been under some form of supervision. I pause there to say that the later doctor, Dr. Gillespie, agreed that the mere question of whether a man ought or ought not to be certified is not a very good test in this matter. D The question of certification depends so largely upon the damage or harm that the affected person may do that it does not really present the acid test of sanity at all. It may be quite true to say that no one could possibly be certified who was not insane. It is not true to say that every person suffering from an insane delusion ought, therefore, to be certified. E That distinction must be borne in mind. No one for a moment suggested that Mr. Bohrmann required certification. Indeed, the delusion from which he was suffering, and the only delusion from which he was proved to have been suffering, was that concerning the London County Council and this valuer, Mr. Hunt. He was not at all likely, as far as anyone could F judge, to do any harm to anyone in consequence of that delusion, and therefore the question of certification never arose. But Dr. Banbury was under no doubt at all that the man he was dealing with in 1933 was a person who was quite unhinged, so far as this question of the London County Council was concerned. G

When one comes to this question of lunacy, one begins to touch the real issue in this case, and what was very dark before became to my mind mainly clearer when I had the valuable evidence of Dr. Gillespie. To a perfect mastery of his subject Dr. Gillespie joins a great lucidity of diction. He presents in the witness-box—to me, at any rate—an impartiality H which it is rare to find, even amongst experts, and the lucidity with which he dealt with this exceedingly difficult topic commanded the greatest measure of my admiration. He was an immensely useful witness. Dr. Gillespie took, as I would expect a man of his eminence to take, the greatest note of a very important fact—namely, that, of the ten uncles and aunts the testator possessed, no less than three had become mentally affected, and mentally affected beyond any question, because they were not only certified, but they were also restrained, and kept under restraint, and died under restraint. There was another relative, a little more distant, who also died under restraint, and the form of mental trouble from which these people suffered was the form of paranoia taking, as I understand it, the particular shape of schizophrenia. Paranoia, as Dr. Gillespie explained it to me, is that form of delusional insanity which is entirely consonant with a clear unclouded intelligence on subjects which are unconnected with the delusion. Schizophrenia, from which these relatives suffered, is a final and aggravated form of even paranoia; and, as I understood it, the paranoia, when it reaches the final stage, is of such a character that the clear unclouded intellect may well begin to disappear, and there is very seldom any kind of recovery from the advanced form. There was no recovery, apparently, in the records we have, which have been proved before me, in the cases of these afflicted relations. The question is—and it is the subject to which Dr. Gillespie at once addressed himself—was this testator a man who could be said to suffer from paranoia or schizophrenia, or was he a man who was free from those disorders but was nevertheless abnormal? Dr. Gillespie's evidence was that that was the class to which he belonged, the abnormal. He was a man whom he, Dr. Gillespie, classed—and it is not a classification of his own; it is apparently a well-known medical classification—as a paranoid psychopath. One was immediately on the alert to see whether, in the doctor's view, a paranoid psychopath would fall over the line of insanity or remain on the line of sanity. Dr. Gillespie had never had the advantage of seeing this patient, and the only matter in which he fell for a moment a little short of my expectations was that he would not agree with Mr. Pritt that this was a very considerable handicap. I cannot help feeling that it must be a very considerable handicap. Dr. Gillespie's view—and he always has a reasonable view—was that it was not really a handicap, because he had, instead of it, the great advantage of hearing the views, formed over a number of years, of other persons who were more or less qualified to judge. He attached much greater importance to the evidence of people with whom the testator rubbed shoulders than he did to that of the medical attendants, against whom anybody who was actually suffering from paranoia would be on their guard. He pointed out that, even if he himself had been there, and perhaps all the more if he himself, with his great reputation, were there, the patient would be on his guard, and, unless he went disguised, he might fail to obtain any very valuable results from his observations. Nevertheless, I cannot help feeling that, much as I respect the doctor, in a matter of which he is perhaps far better qualified to judge than I am, it is a handicap not to have seen this man alive and to be obliged to rely upon a vast body of evidence. It is a handicap, I think, to assess—and I have found it, with many years' experience, very difficult to assess

—this vast body of evidence which he had to assess before he could arrive at his conclusion. However, the conclusion at which he arrived —and, as usual, he was perfectly precise about it—was that this man was a paranoid psychopath, and thus deficient in human affections and in the common instincts of mankind. I think that it is for me rather than for him to say whether a person so deficient is or is not capable of the discharge of the major social responsibilities. In one or two of these phrases, there was an echo of legal learning rather than one of medical research, but I make no complaint of that. There is no reason at all why the doctor should not study the legal side of the matter and try to bring his evidence, as he did, within the ambit of well-known legal decisions.

I have to address myself to the question of whether, accepting Dr. Gillespie's evidence to the full, it is within the ambit of a known and well-trusted legal decision, outside which no one has really sought to take me, that best of all guides on this question, the judgment of SIR ALEXANDER COCKBURN, C.J., in *Banks* v. *Goodfellow* (1), at p. 565 :

> Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease ; if insane suspicion, or aversion, take the place of natural affection ; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.

Mr. Roland Oliver, in his careful argument upon this line, sought to read that passage in what I may perhaps call, for the purposes of simplicity, a disjunctive manner. He took the first limb of the sentence, " If the human instincts and affections, or the moral sense, become perverted by mental disease," and sought to say that that could be taken by itself, and was, in the meaning of SIR ALEXANDER COCKBURN, C.J., sufficient to avoid a will. That is a nice point. Did SIR ALEXANDER COCKBURN, C.J., mean that disjunctively or not ? For my part, I must say that for many years I have read it conjunctively. I have read it as meaning that all this sentence stands together, and that the limbs are part of the whole. I do not think that the law so far has recognised any half-way house between sanity and delusional insanity. This judgment in *Banks* v. *Goodfellow* (1) makes it perfectly clear that the law has recognised as long ago as 1870 that a man may suffer from delusional insanity and yet make a perfectly good will, so long as the delusions from which he suffers have no relation to any testamentary capacity. It is unnecessary to give examples ; they will spring at once to anybody's mind. But it is quite possible to believe—indeed, most people may have one or two sad examples of a person they have come across in their own lives—that a person should be a victim of a delusion amounting to an insane delusion, but should be completely and perfectly sound upon all questions which have any relation to testamentary capacity. So much the decision of *Banks* v. *Goodfellow* (1) to my mind irrefutably establishes, but, when one is asked to say that one can go a step further, and to say that, if the human instincts are to a certain degree wanting in a person, that person is therefore incapable of making a will, I think that one is treading upon dangerous ground. As I observed in argument, English law is fortunately of a progressive character. I am one of those persons, perhaps old-fashioned, who cling to the idea of progress. I entertain the belief that science can help us to both material and mental advances, but I also believe, as Professor Dicey has pointed out, that the law generally lags behind public opinion, and that it is wise that the law should do so. We must be sure of the ground upon which we tread. We may not adventure into the snow-capped peaks marked "Experiment and adventure." Here, I think, I am asked to go outside what this decision really says, and to go outside any fair reading of an avenue of progress from this decision. When one is asked to say that there is a category, known to medicine, which falls short altogether of delusional insanity, and to say that people falling into that category are incapable of making a will, then in my opinion one is asked to do something which can be done by legislation only. It may be that science has already advanced to that stage at which the category can be fairly and clearly determined, and it may be that the legislature, when informed thereof, would wish to make that advance, but, so far, that advance has not been made, and it is not, in my judgment, within my power to make it here.

Assuming, therefore, that the whole of Dr. Gillespie's evidence at its face value is to be taken as exactly accurate, I cannot think that he establishes a position in which I should be justified in finding that the testator was incapable, by a lack of human instinct and common understanding in the matters of affection, of making a good will. I am not at all satisfied, great as is my admiration for Dr. Gillespie's evidence, that his evidence could really be accepted as a completely accurate estimate of the position. That the testator might well fall within the medical category in which the doctor placed him is no doubt a fact on which the doctor is better able to judge than I am, but I think that Dr. Gillespie paid too little attention to one or two matters that are, to my mind, of the first importance. He was impressed by the fact that this testator suffered from some form of hypochondriasis. He was impressed by his vanity, by his imperviousness to argument, and, most of all, by his treatment of his mother. He was impressed by the fact that he suffered more than usual from the feeling that people had a grudge against him, and by the fact that the testator had a grudge against his mother, and the reasons were therefore wildly exaggerated in his mind. He was impressed by the outbursts of fury, and by the fact that the testator was, as the doctor said, emotionally immature. I have reviewed all those items because they make the strength of Dr. Gillespie's case, but, against that, Dr. Gillespie admitted, as one knew that he would, that he was shaken to a certain extent by the fact that this man, the testator, made to one of his relations who got into financial trouble a totally unnecessary present of a sum of no less than £400, which, as the doctor delightfully said, came from a man with a well-known rigour in matters of dealing with money. This present of £400 was made by the testator to a needy relative, and was indeed a most valuable help. He was only asked to lend the money, but he gave it as a present, and he accompanied his gift by a curiously wise suggestion—that, if the recipient of the gift felt that he ought to pay interest, he should pay it into a bank for the benefit of his, the recipient's, children. It is very difficult indeed to believe that a man was insanely wanting in any form of human affection, or even that he was completely wanting in any form of human instinct and affection, when he could do that, and at the same time write, both to the recipient and to the recipient's mother, a series of letters breathing very considerable affection, and expressing a general tone that would not disgrace the most sensible and sensitive man in the world. That incident, a very important incident in his life, seems to have given the doctor pause, but not to have shaken him to anything like the extent to which it shook me. Therefore, I cannot accept the doctor's evidence at quite the whole value that should be put upon it if that incident had never occurred. In addition to that, there is the fact that two of his cousins, as to whose claims he is supposed to have been violently and wildly insensible—namely, Catherine and Louisa—were left sums, one of £1,000 by the brother, and one of £1,000 by the mother, which the testator was, as it were, personally charged to carry out, without any real legal force. Those sums were not properly left by will at all, but were really left as directions to him to be carried out, and he was the person who suffered in pocket by carrying them out. Again, it seems to me almost impossible to believe that this was a man who was incapable of the human instincts of affection and consideration for relatives when he went so far as to carry out those instructions, which did not amount to any legal request.

There was a third point which was put to the doctor—the fact of his making a will or codicil leaving to his mother everything he had inherited from his father. I am not quite sure that that stands in the same category of force, because there must have been a somewhat noticeable coincidence in the date of this codicil and the date of the will which his mother made in his favour. However, Dr. Gillespie really relied more on his treatment of his mother than on anything else, and no doubt there is the greatest force to be attached to that. Balancing the matter as best I can, and giving the fullest weight to the evidence of Dr. Gillespie, as I see it, in any case the law does not allow me to say that the kind of person he classes as a paranoid psychopath was incapable of making a will, and I have just a shadow of doubt as to whether the doctor has really given full force to these countervailing points which go to show that the man was not fully dead to any human instincts and affections.

That leaves me one point only, perhaps the most difficult of all, that of the last codicil. The testator's delusion as regards the London County Council seems to me to be, in its later stages at least, perfectly well established. There is the evidence of the doctor who attended him. There is a series of witnesses each of whom speaks to the wholly ridiculous terms in which the testator characterised the London County Council. There is an absurd doggerel curse, which falls far below the level of the well-known intelligence of this man, and I have no doubt whatever that this man, during the last months of his life, was suffering from a quite insane delusion concerning the London County Council. There, again, one has to bear in mind the medical history, the relations who suffered from this schizophrenia, and the tendency—there was a strong tendency, as Dr. Gillespie put it, when three out of eleven in one family were thus affected—towards this kind of mental disorder. This fourth codicil, which is the only one which comes under review in this matter, was made on Sept. 9, 1932—that is, less than a year before the testator died. The difficulty that I have there is that it is very difficult indeed to put one's hand upon any evidence which would show at what time the delusion from which he ultimately suffered began. To trace the matter historically, the London County Council were first beginning to take action in 1931. The testator went to New Zealand, and returned, a fitter and stronger man than he had been before, in Feb., 1932. From then onwards he appears to have thrown himself into this battle with the London County Council with an intensity and to a degree that undoubtedly hastened his end. He became quite oblivious to the care of his own health, which up till then had been one of the prepossessions of his life. He spoke in the most ungovernable terms of everybody connected with the London County Council, and perpetually returned to this ridiculous suggestion that Hunt, the valuer, was the person who was instigating the campaign against him. It is very difficult to say when this at first merely unreasoned opposition developed into delusional insanity, and there I have no medical evidence to guide me. I have, however, the fact that the codicil contains a most extraordinary declaration that cl. 6 of his will, by which he had left his money to charities, should be :

> read and construed as if the word " England " were deleted therefrom and the words " United States of America " were substituted for the word " England."

Just how a man can have reasoned that, because the London County Council were persecuting him, therefore English charities ought not to benefit, and American charities ought to benefit, it is very difficult to see. However, it is not merely on reasoning of that sort, which would probably be untrustworthy, that I have arrived at my conclusion on this matter. I think that this was a man of the greatest degree of eccentricity. Up till Feb., 1932, I can see no trace of delusional insanity. In 1933, I am satisfied that he was suffering from a delusion, and from delusional insanity, and that, from 1932 onwards, throughout that year till his death, this campaign against the London County Council was the overmastering motive of his life. I think that there is evidence that at as late a date as May, 1933, he was still quite a fit man, and not suffering from additional physical troubles. I think that after that time there is no evidence of his physical state which would enable me to say with any precision what was his physical trouble, if any, in Sept., 1932. However, having regard to the fact that he was in the end suffering from this delusional insanity, and to the fact that it is very difficult to put any reasonable interpretation upon this particular declaration in his codicil, I think that it is right and proper that I should consider that clause apart from the rest of the codicil, which is in reasonable and quite natural terms, and must have been quite unaffected by this particular delusional insanity. I have paused a good deal in taking this view, because, again, I am impressed by the danger of departing from well-known rules. I know of no case, and counsel have not been able to give me a case, in which any judge of this court has divided a testamentary instrument, such as a will or a codicil, and has said, as to one part: "I see no reason to disturb it, because in any event it cannot have been affected by the delusion from which the testator suffered, but, as regards another part of it, I think this must have been dictated by some form of delusion," or "I think it is fairly proved to have been so dictated." As a matter of law, I feel that this is, perhaps, going a step beyond what has yet been decided, but I cannot see that it is in conflict with the well-known decisions. I do not think that I am here taking it upon myself to transgress upon what is really the field of the legislature. It has been the practice in this court for many years to delete from instruments of testamentary disposition anything which the court is satisfied is not brought to the knowledge and approval of the testator. I conceive that I am doing no more now in declaring for this codicil without cl. 2 than I should be doing in deleting from the codicil something which I believe was never brought to his knowledge and approval as a sane, balanced man. I think that he was at that time, so far as I can judge of the matter, with all the material at my disposal, suffering from a delusion at the moment when he inserted cl. 2 into his fourth codicil, the codicil of 1932.

My judgment in this case, therefore, will be that I shall declare for the will of Nov. 26, 1926, and for the four codicils, with the exception of cl. 2 of the codicil of Sept. 9, 1932, which should be deleted from that instrument.

Solicitors: *Druces & Attlee* (for the plaintiffs); *H. R. Ballantyne* (for the defendant).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

SUTHERLAND *v.* EXECUTORS OF JAMES MILLS, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 18, 1938.]**

Factories and Shops—Dangerous machinery—Fencing—Unfenced gear-wheels of reeling-machine—Injury to workman—Factory and Workshop Act, 1901 (*c.* 22), *s.* 10 (1) (*c*).

The respondents were charged with having failed to have certain machinery in their factory securely fenced, which machinery was dangerous to persons employed or working there, in consequence of which one of their workmen was injured. The machinery consisted of an electrically-driven reeling-machine, for the purpose of straightening and polishing steel bars and rods. While the workman was passing steel bars through the reeling-machine, and was endeavouring to pass a long rod, which was bent, through the machine, he was injured. The justices dismissed the charge, holding that the machinery was not dangerous, on the ground that, *inter alia*, the workman had no cause to put his hand near the gear-wheels, and that the machine had been inspected by H.M. factory inspectors, who did not raise any objection to its construction :—

HELD : as the purpose of the Act of 1901 is to provide protection against machinery which is dangerous in fact, it was not enough to say that, if the workman had obeyed his instructions, he would not have suffered injury, nor could it be said that the burden was shifted by the Act upon the factory inspector. The offence charged was, therefore, proved.

[**EDITORIAL NOTE.** This case again emphasises the absolute nature of the duty of the employer under the Factory Act, 1901, to fence dangerous machinery. The particular point of interest in the present case is that it negatives the defences (i) that user without accident for a very long period, or (ii) that the inspector has never objected to the fencing as inadequate or lacking, is proof of compliance with the requirements of the Act.

AS TO FENCING OF DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130 ; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 65-81.]

Case referred to :

(1) *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192 ; 24 Digest 909, *71* ; 66 L.J.Q.B. 173 ; 76 L.T. 159.

APPEAL by way of case stated from a decision of the justices for the county of Chester, sitting at Stockport. The facts and the arguments are set out in the judgments.

Valentine Holmes for the appellant.

B. S. Wingate-Saul for the respondents.

LORD HEWART, L.C.J. : This is a case stated by five lay justices for the county of Chester, sitting at Stockport. It arises out of an information preferred by an inspector of factories and workshops, the present appellant, against the respondents for that their factory was not kept in conformity with the Factory Acts, inasmuch as certain machinery, dangerous to persons employed or working there, to wit, the gear-wheels of a reeling-machine, was not securely fenced, contrary to the Factory and Workshop Act, 1901, s. 10. The justices, having heard the evidence and come to the conclusion that the case was not made out, dismissed the informations, and, indeed, permitted themselves to express the view that the cases ought never to have been brought.

The facts of the case are simple enough. It is found that in the factory referred to there was an electrically-driven machine, known as a reeling-machine, for the purpose of straightening and polishing steel bars and rods. The bar or rod had to be hand-fed from a wooden trough into an aperture in the machine. It was then passed through the machine between two rollers rotating at 102 revolutions per minute. That rotation caused the rod to spin round as it passed through. Then the case says this :

> On the outside of the said frame there is a pair of toothed gear-wheels (hereinafter referred to as "the said gear-wheels") 10 ins. and 6 ins. in diameter respectively which, when the machine is working, rotate at approximately 60 revolutions per minute and 102 revolutions per minute respectively. The nip between the said gear-wheels is only a few inches from the aperture in the said frame through which the rods are fed into the machine. At all material times the said gear-wheels and nip were not specifically fenced and/or specifically protected.

The case goes on to find what happened. On a morning in April, a workman was passing steel bars through the reeling-machine. The case says that he was endeavouring to pass a long rod, which was bent, through the said machine, and that for this purpose he was holding the rod at a point near the end which he was trying to feed on to the rollers through the aperture in the frame. The bend in the rod caused it to stick. The workman was trying to free it by twisting it with his left hand when it jerked, and threw or knocked his hand on to the gear-wheels, where it was caught in the nip and badly crushed, three of the fingers being torn off. Then amongst the findings of facts these findings are added :

> Occasionally the respondents' employees when passing bars which were found to be bent at the end, through the said machine held such bars at a point near the end inserted through the aperture, thereby preventing the bar in question from whipping as it passed through the rollers. This practice was not in conformity with the respondents' instructions, which were to the effect that an employee when dealing with a bar which was found to be bent at the end inserted should withdraw the same from the said machine, turn it round, and insert the other end first. Employees in the ordinary course of working the said machine should not at any time have their hands nearer than about 4 ft. from the said aperture, rollers, or gear-wheels, and were instructed by the respondents not to approach the said aperture, rollers, or gear-wheels when the said machine was working.

Then comes the interesting sentence that it is found as a fact by these justices that the said workman was warned by the respondents to take care with regard to the said gear-wheels, and not to approach close thereto. In that state of the facts, it is contended, on behalf of the appellant, that those gears constituted a dangerous part of the machine, and were not securely fenced. On the part of the respondents it is contended—and all the contentions are of interest, because it appears that the justices accepted every one of them, lock, stock and barrel—that the fact that an accident had happened did not bring the said machinery within the category of a dangerous machine ; that there was no

evidence that the said machine was dangerous, or not securely fenced; that the said workman had no cause to put his hand near the said gear-wheels; that, if he had obeyed his instructions, the said accident would not have occurred; that the fact that the machine had been in use for 30 years without an accident, and had been inspected by His Majesty's
A factory inspectors, who had raised no objection to its construction, went to show that it was not dangerous; and that the respondents were not guilty of the offences charged. The justices were of the opinion that the contentions on the part of the respondents were correct, and accordingly they dismissed the informations, and took the trouble to add
B that they told the appellant—that is, the inspector—that, in their view, the cases ought never to have been brought.

It is said that miracles do not happen, but this case stated looks as if that saying is not accurate, because on this evidence the justices found, among other things, that there was no evidence that the machinery
C was dangerous, and that there was no evidence that it was not securely fenced, and that, too, although they had already found that the workmen in this factory were instructed not to approach the said aperture, rollers, or gear-wheels, when the machinery was working, and that this particular workman who sustained the injury had been warned by the
D respondents to take care with regard to the gear-wheels, and not to approach close to them. I can only suppose that the extraordinarily persuasive manner of the advocate who appeared for the respondents on this occasion—so persuasive, I gather, that he was actually stopped before he had come to an end of his argument—overwhelmed these
E justices, and they have accordingly packed into para. 8 of this case a fine selection of the fallacies, if I may respectfully use the term, with which, to my knowledge, this court has been dealing for more than 20 years, and with which I myself, to the best of my ability, have been dealing now for 16 years. It ought not to be necessary to point out that
F it is not enough to say that, if a workman obeys his instructions, he will not suffer injury. A large part of the purpose of these statutes was to save workmen from themselves. That is to say, not to save them from deliberate acts of mischief, but to save them from consequences which they may incur if, in haste, hurry, carelessness, or, it may be,
G indolence, they do something in a way in which they ought not to do it; nor ought it to be necessary to point out that the burden is not shifted by the Factory and Workshop Act upon the factory inspector. The justices, apparently, followed the line of reasoning which had been suggested—that they might regard this machinery as not dangerous
H in fact, because, in view of its history, persons might be reasonably led to think that it was not dangerous. The section is dealing with machinery which is dangerous in fact. I cannot help observing that the particular passage in the case of *Hindle* v. *Birtwistle* (1), the flying-shuttle case, has once more been adduced as having a relation to this case. The words of the judge which are so often referred to are to be

read, in my opinion, with reference to the subject-matter of that case. That case turned upon an accident that had been caused by means of a flying shuttle—that is to say, by means of a part of the machinery which was doing something which it was never intended to do, and was not expected to do. It is very difficult usefully to apply observations made upon that case to cases where machinery is employed for the very purpose for which it is intended to be employed, and where the accident takes place by reason of the fact that a workman—it may be carelessly, it may be hurriedly, or it may be accidentally in the proper sense of the term—brings a part of his body into contact with a dangerous part of the machinery.

In my opinion, these justices came to a wrong determination. I think that this appeal ought to be allowed, and that the case ought to go back to the justices with a direction to find that the offences which were charged were proved.

BRANSON, J.: I agree.

HUMPHREYS, J.: I am of the same opinion, and I add a word or two only because I cannot bring myself to think that the justices really intended to indicate that they accepted all the contentions on behalf of the respondents. LORD HEWART, L.C.J., has read the words of their opinion, which in terms do indicate that that was their view, because they say:

> We being of the opinion that the contentions on behalf of the respondents were correct.

If that is to be taken to mean that, then I agree that the case is one of a hopeless character, from the point of view of the respondents, but, if it be that the justices really took this view which is expressed in the first of the arguments on behalf of the respondents, that the fact that an accident had happened did not bring the said machine within the category of dangerous machines, I am disposed to agree with them. I will add only that I think that the justices have gone wrong here in not having regard to the fact that this machine—dangerous in one sense, in that it was quite possible to hurt oneself from it if one put one's hand into a certain part of it—was being used by a man who was employed to use it, and employed to use it for the purpose for which he was using it. In any case in which it is proved that the machine is dangerous to a person who is employed to use it, and actually causes injury to that person when he is so using it, it does seem to me to be impossible to contend that that machine is not a dangerous machine within the meaning of this Act, because the Act provides that machinery which is dangerous to persons employed or working in the factory must be securely fenced.

On the facts of this case, I entirely agree that the evidence is conclusive that the person who was injured was employed to do that which he was, in fact, doing at the time when he was injured by the machine.

He was employed to work on this machine. That being so, I think that it is quite impossible to say, as a matter of law, and as a matter of common sense, that that machinery which so injured that person was not dangerous machinery, dangerous to persons employed or working in the factory.

Appeal allowed with costs, and case remitted back to the justices with a direction to find that the offences charged were proved.

Solicitors: *Treasury Solicitor* (for the appellant); *Church, Adams, Tatham & Co.*, agents for *Cobbett, Wheeler & Cobbett*, Manchester (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re GODWIN, COUTTS & CO. *v.* GODWIN.

[CHANCERY DIVISION (Farwell, J.), **January 13, 1938.**]

Trustees—Bank—Income fee—Withdrawal fee—Incidence—Direction to set aside sum to produce an annuity of stated amount.

The testator appointed a bank as one of his executors and trustees and included the usual clause in his will empowering the bank to charge income and withdrawal fees. He directed in three cases that his trustees should set aside such a sum as would provide annuities of stated amount for certain beneficiaries. In the case of two of these annuities the sums set aside were, on the death of the annuitants, to fall into residue. In the third case the sum was to be held in trust for all the children of the annuitant who should attain 21 years of age, or, being female, attain that age or marry; but in the event of no child attaining a vested interest the fund was to fall into residue. A summons was taken out to determine the incidence of the bank's income and withdrawal fees:—

HELD: (i) where the funds fell into residue, the withdrawal fees were payable out of the residuary estate; but if a child or children attained a vested interest or interests in the third fund, then the withdrawal fee would fall upon that fund.

(ii) as to the income fee, the directions in each instance being, not to pay a stated annuity out of residue, nor to set aside a stated sum, the income fee was payable out of the income of the fund, but such a fund must be set aside in each case as would produce an income sufficient to pay the stated annuity and the income fee.

[EDITORIAL NOTE. It was decided in *Re Riddell* (2) that, in the case of an annuity to be paid out of residue, the income fees falls upon residue. Where the direction is to set aside a stated sum and to pay such income as that sum produces to a beneficiary, the income fee has to be borne by the beneficiary. This was decided in *Re Roberts* (1). The direction in the present case is to set aside such a sum as will produce a stated annuity. In this case the income fee must be provided for, by setting aside a sum that will produce an income sufficient to pay both the annuity and the income fee, since the intention of the testator is that the annuitant shall have the stated sum clear of deduction in this respect.

AS TO REMUNERATION OF TRUSTEES, see HALSBURY, 1st Edn., Vol. 28, Trusts and Trustees, pp. 162-164, paras. 335-337; and FOR CASES, see DIGEST, Vol. 43, pp. 773-775, Nos. 2136-2147.]

Cases referred to:

(1) *Re Roberts' Will Trusts, Younger* v. *Lewins*, [1937] Ch. 274; [1937] 1 All E.R. 518; Digest Supp.; 106 L.J. Ch. 232; 156 L.T. 213.

(2) *Re Riddell, Public Trustee* v. *Riddell*, [1936] Ch. 747; [1936] 2 All E.R. 1600; Digest Supp.; 105 L.J.Ch. 378; 155 L.T. 247.

ORIGINATING SUMMONS for the determination of the following questions:

(1) Whether upon the true construction of the said will and in the events which have happened: (*a*) the income fees payable to the plaintiffs in respect of the income of the respective funds which fell to be set aside to provide the annual payments bequeathed by clauses 5, 7 and 11 (i) of the said will or any of them, and, if so, which, should be charged against and paid out of (i) the income of such funds, or (ii) the A income of the testator's residuary estate or how otherwise the payment of such income fees ought to be provided for by the trustees of the said will and codicil, (*b*) the withdrawal fee which will become payable in respect of the fund which fell to be set aside to provide the annual payment bequeathed by cl. 7 aforesaid should be charged and paid out of B (i) the capital of such funds, or (ii) the capital of the said residuary estate or how otherwise the payment of such withdrawal fee ought to be provided for. (2) If the court should declare that the income fees in respect of the income of the fund which fell to be set aside to provide the annual payment bequeathed by cl. 7 of the said will should be charged against C and paid out of the income of such fund and/or that the withdrawal fee which will become payable in respect of the said fund should be charged against and paid out of the capital thereof, whether the trustees of the said will (*a*) should pay such income fees out of the income, and/or such withdrawal fee out of the capital, of the fund already appropriated D to provide such annual payment, or (*b*) should appropriate a further fund sufficient at the time of appropriation to produce an annual income equal to (i) the maximum, or (ii) the minimum, annual amount of such income fees and/or of a sufficient capital amount to provide such withdrawal fee; and if such a further fund should have to be appropriated, E whether the same should be treated for all purposes as an accretion to the fund already appropriated as aforesaid or should, subject to the provision thereout of such income fee and/or withdrawal fee, revert to and form part of the testator's residuary estate, or how otherwise the same should be dealt with. (3) If the court should declare that the income fees F in respect of the income of the fund which fell to be set aside to provide the annual payment bequeathed by cl. 11 (i) of the said will should be charged against, and paid out of, the income of such fund, whether the trustees of the said will (*a*) should pay such income fees out of the income of the fund already appropriated to provide such annual payment, or (*b*) should G appropriate a further fund sufficient at the time of appropriation to produce an annual income equal to (i) the maximum, or (ii) the minimum, annual amount of such income fees; and, if such a further fund should have to be appropriated, whether the same should be treated for all purposes as an accretion to the fund already appropriated as aforesaid, H or should, subject to the provision thereout of such income fees, revert to and form part of the testator's residuary estate.

Maurice Berkeley for the plaintiffs.

D. Ll. Jenkins for the first four defendants.

R. Lionel Edwards for the remaining four defendants.

Jenkins: In each of the three cases the annual sum which the testator has given to the annuitant should be received by that annuitant or tenant for life undiminished by the income fees payable to the bank. The executors would not be carrying out the testator's intention to set aside a sum sufficient to provide an annuity of £100 if they set aside only A a sum sufficient to produce that amount less the income fee. In that case they would be setting aside a sum sufficient to produce £98 only. Where the gift is of a definite sum, the setting aside of that sum frees the residue.

Edwards: Both the income fee and the withdrawal fee should be paid B out of the sum set aside. With regard to the withdrawal fee, it makes no difference if the fund will find its way back to residue in the future. But where the fund will find its way to others than those interested in the residue, the withdrawal fee ought not to be paid out of residue. On principle, the withdrawal fee should be paid out of the sum set aside. C With regard to the income fee, the will should be looked at to see if it contemplated and directed that a separate fund should be set aside. The test to apply is the setting aside. Therefore both the income fee and the withdrawal fee should be paid out of the fund in each of the cases mentioned in the will of the testator. The income fee is simply D a payment for part of the machinery which gets the money into the hands of the beneficiary. Unless there is a clear direction to the contrary, the beneficiary should pay for that machinery.

FARWELL, J.: John Godwin made his will on Jan. 24, 1934. He E made a codicil to his will in May, 1935, and he died on Sept. 25, 1935. After the date of his death, certain sums were set aside, owing to the direction in his will, to provide for certain annuities, but a question has arisen as to the payment of certain income fees and withdrawal fees in the case of those sums. The matter has already been before the court F in another connection, but this question was not raised nor discussed nor decided in those proceedings, and now comes before me for decision. The relevant parts of the will are these. The testator appointed Coutts & Co. and a certain gentleman to be executors and trustees, and he declared that the bank should be entitled to be remunerated for their G services as such executors and trustees

> in accordance with the appropriate scale of fees published by the bank and in force at the date of this my will and shall be entitled in addition to all usual bankers' charges for the time being and shall be entitled to act as bankers to my estate for all purposes.

The first part of the will to which I need refer is cl. 5, in which the H testator provides:

> I direct my trustees to set aside out of my estate a sum sufficient at any time of so setting aside to produce the annuity next hereinafter mentioned and to stand possessed thereof upon trust to pay out of the income thereof the sum of £100 a year to Alice Frances Godwin widow of my deceased brother Joshua Godwin during her life commencing from my death to be payable by equal monthly payments in advance the first thereof to be made as soon as possible after my death and after

her death the sum so set aside as aforesaid and the investments representing the same and the income thereof shall fall into my residuary estate.

Then cl. 7 provides:

> I direct my trustees to set aside out of my estate a sum sufficient at the time of such setting aside to produce after deduction of income tax at the rate current at the date of my death the clear yearly sum of £500 upon trust to pay such sum to my niece Mabel Clarence Price during her life and from and after the death of my said niece I direct that my trustees shall stand possessed of the investments representing the sum so set aside under this clause to produce the annual sum of £500 in trust for all or any of the children or child of my said niece who being male shall attain the age of 21 years or being female shall attain that age or marry and if more than one in equal shares and if my said niece shall not have a child who attains a vested interest in the said fund then I direct that the same shall sink into and form part of my residuary estate.

Finally, in cl. 11 (i) the testator directs as follows:

> My trustees shall as soon as conveniently may be after my decease set apart and invest in the names of my trustees in accordance with the provisions relating to investments contained in this my will so much of my residuary estate as by means of the income thereof will at the time of its being so set apart and invested produce the clear annual sum of £100 and shall stand possessed of the funds so set apart and invested upon trust to pay the income thereof when and as the same shall from time to time be received to my sister-in-law Maude Godwin during her life and subject to the trust aforesaid I direct that the same funds shall sink into and form part of my residuary estate.

Messrs. Coutts & Co., having been appointed executors, and having accepted the trust, are entitled under the direction contained in that will—of course, it amounts to a legacy to the bank—to be paid certain fees. Among other things, they are entitled to a fee on the actual income received out of such investments at the rate of £2 per cent., but there is a provision that, in the event of the person to whom the income is payable keeping his banking account either at Coutts Bank or at the National Provincial Bank, a lesser sum will be accepted. The bank is also entitled to be paid, on withdrawal from the estate of any property forming part thereof, a fee on the gross value at the date of the withdrawal of the property so withdrawn at the same rate per cent. as that at which the acceptance fee was payable upon the whole estate.

The questions which I am asked to determine are questions as to the source from which the income fees payable in respect of these three sums, and the withdrawal fee are to be paid. So far as the withdrawal fee is concerned, the matter in this case is not of very substantial importance, at any rate, so far as the annual sum given to Mrs. Godwin and the annual sum given to Maude Godwin are concerned. After the annual interest given to those two ladies ceases at their respective deaths, the fund falls into and forms part of the residue. The residue, therefore, will have to bear the withdrawal fee, and it is really not a matter of any importance, nor one that I need consider further. The only case of the three in which this question may become important is with regard to the sums set aside to produce £500 a year for Mabel Clarence Price, because, if that lady has a child or children who attain a vested interest in that fund, that fund will become the property of that child or of those children, and will not form part of the residue. On the other hand, if

the lady has no child who attains a vested interest, then the question really does not become one which has to be considered, because the sum set aside falls into residue, and residue has to bear the withdrawal fee. In the event of there being children, the matter is one of some little importance. In the case of the withdrawal fee, if, on the death of Mrs.
A Price, there are children of hers who take, so that the fund can never get back into the estate at all, I cannot myself feel any doubt that the withdrawal fee must be paid by those persons who will benefit by the gift under the will—that is to say, by the child or children of the lady who ultimately will become entitled to this fund. On the other hand,
B if there are no children, then the fund falls into residue, and no question arises. Once this sum is set aside to produce the £500 a year for the lady, and once it is clear that there are children of that lady who take a vested interest, then that fund ceases altogether to be part of the estate of the testator. It is segregated from that estate, forms a trust
C fund of its own, and, in my judgment, so far as the withdrawal fee is concerned, the beneficiaries under that trust have no ground upon which they can properly call upon residue to find the necessary money. Therefore, so far as that is concerned, in my judgment, the withdrawal fee, in the event of there being children of Mabel Clarence Price who take the
D fund, must be paid out of the fund itself, and not out of residue.

The question of difficulty, so far as it is a question of difficulty, arises with regard to the income fee. The position with regard to that is this. It has been determined by two cases, one a decision of CROSSMAN, J., in *Re Roberts' Will Trusts* (1), and one a decision of my own in *Re Riddell,*
E *Public Trustee* v. *Riddell* (2), that, where a testator appoints an executor, and gives that executor the right to charge fees for his services, including an income fee, and gives annual sums to be paid out of the income of the residue, in such a case the income fee has to be paid out of residue, and not out of the annual sums payable to the annuitant. I think that
F the reason for that is quite plain. Persons who are residuary legatees are entitled to nothing until the annuitants have received their annuities, and part of the administration expenses which are necessary to enable the estate to be distributed is the income fee. The income fee is something which the estate has to bear, and which cannot be thrown upon the
G persons who are entitled to yearly sums payable in front of the income of residue. But, as CROSSMAN, J., has well pointed out in *Re Roberts' Will Trusts* (1), the difference between the direction in a will to set aside a particular named sum and to hold that sum on trust for A. with remainder to B. and the case of an ordinary annuity
H is perfectly plain, and perfectly well marked. In the one case, the trustees' duty is to take the sum which is named in the will and to segregate it, as it were, from the estate of the testator, to invest it and hold it as a separate trust fund altogether. Out of that trust fund the income and the capital must be applied in accordance with the trusts of that fund declared by the will, and the moment the sum provided for

in the will is taken out of the estate of the testator, and becomes simply a trust fund for the benefit of the persons who are the beneficiaries named in the will, as being the beneficiaries of that trust fund, any expenses incurred in administering that fund must be borne by the income or the capital, as the case may be, of that fund, and there can be no ground for calling upon the residuary legatees to pay either income or capital charges, because the fund has ceased to be any part of the estate of the testator, and in no circumstances can come into residue or come back to the testator's estate. In this particular case, I have not, on the one hand, the simple case of the gift of annuity payable out of residue, nor, on the other hand, have I the case which CROSSMAN, J., had, of a definite sum which is to be set aside to create a separate trust fund. Here the case really falls in between those two cases, and I must, therefore, decide it on principle. I do not think either of the cases to which I have referred can assist me, except in so far as they lay down the general principle. In this case, there is no direction to set aside a stated sum of money. It is not a case where the testator has said, " Take £5,000 out of my estate and invest it and hold it upon trust for A. for life with remainder to A.'s children," or something of that sort, which defines quite plainly what the amount to be taken is, and which is a segregation of that sum from the general residuary estate. In this case, dealing with the first of the matters that I have to consider, what the trustees are directed to do is to set aside out of the estate a sum sufficient to pay £100 a year to Mrs. Godwin, and on the death of that lady the sum is to form part of residue. So that the fund which is to be provided to produce this annuity is not a fund which is in any sense taken out of the testator's estate, not a separate fund segregated from the rest and forming a separate trust fund. It is a fund which the trustees have to provide out of the estate, and which has, from its income, to produce an annuity for the lady, but which, on the determination of the annuity, remains in their hands as part of the residuary estate. In those circumstances, in my view, once the fund which is sufficient to produce the annuity has been set aside, there is nothing to prevent the remainder of the residuary estate from being distributed, if it is distributable, under the will. In other words, in my judgment, the income of the fund set aside is the income which must be looked to for payment of the annual fee.

But that does not by any means decide this matter, because it remains to consider what sum ought to be set aside to produce the income. That is to say, is it sufficient if a sum which will produce £100 a year is set aside—which will mean that the annuitant will not get £100 a year, but will get only £100 a year less the income fee charged by the trustees —or does it mean that the trustees' duty is to set aside a sum which is sufficient to provide not only the annuity but also the income fee, so that the lady will get, in fact, the £100 a year which the testator has given her ? In my judgment, this is not a case like the case of *Re Roberts's Will Trusts* (1), not the case of a particular named sum directed to be set aside. It is the duty of the trustees to determine what the sum is which is required to produce £100 per annum. It is not true to say that the trustees will be performing their duty fully if they set aside a sum which is sufficient only to produce £100 a year, less the amount of the income fee. The income fee is something which has to be provided, it is an administration expense in one sense of the term, and, if the sum set aside does not produce enough to pay the income fee and then give the lady £100 a year, the trustees are not doing that which the testator has directed. In other words, if that were what was done, instead of the lady getting £100 a year she would be getting something less. Therefore, in my judgment—at any rate, so far as the gift in cl. 5 and the gift in cl. 11 of the will are concerned—the sum set aside must be a sum sufficient to pay the full annuity together with a sum sufficient to produce the income necessary to pay the income fee, and the income fee must be taken as being the 2 per cent. in accordance with the terms of the bank's charges The mere fact that some relief may be given because the beneficiary chooses to bank at one of two particular banks is not a matter which I can take into consideration. Once the sum which is sufficient to produce both the £100 a year and the income fee has been set aside, then, of course, there is nothing whatever to prevent the residue from being distributed, assuming that it is distributable, amongst other persons, because, once that is done, the income which will be available and which can be available for payment of the income fee is the income produced by the sum set aside. In this case, it has to be borne in mind that the income fee payable in a case of this sort differs completely and wholly from income tax or super tax. The unfortunate person who has his income tax deducted at the source, and gets only a portion of the sum due to him, is, none the less, deemed to have received the whole of it, and he has the pleasure of paying sur-tax upon it, and the person who pays the whole of the amount is treated as being the agent of the person who is the recipient of whatever is left when the income tax has been deducted. So the position is a totally different one. Dealing with the question of this income fee, in my judgment, it is no assistance whatever to consider the question of income tax. It has been argued by Mr. Edwards—and I am much obliged to him for his very interesting argument—that, in order to get the effect which I suggest is the right one, very clear words must be found in the will. I do not accept that view. That is to say, I think that, once it is found that the testator has left to his executors the duty to determine the amount which is to be set aside to produce an annuity, the sum must be sufficient to give the annuitant the annuity given by the will; and, once one finds that, it follows that their duty is also to provide a sum the income of which will be sufficient to produce the income fee.

With regard to the gift in cl. 7, there is this difference. In the other two cases, the whole of the fund, including the fund set aside to meet the annuity and the sum set aside to meet the income fee, will fall back and form part of the residuary estate, and, therefore, although the residuary estate will be reduced, as it were, temporarily, in time the whole fund will come back into residue. But in the case of Mabel Clarence Price, assuming that she has children who attain a vested interest, the sums set aside can never come back into residue. They will pass to her children. It is said that the children will get an undue advantage, because they will get a capital sum in addition to the sum required to produce £500 a year. I do not think that there is anything in that contention, because, if it were correct to read this direction as a direction to set aside a sum which is to be sufficient to produce £500 a year without any deduction for income fees, then the obligation on the trustees must be to set aside a fund sufficient to pay the £500 a year clear, and that will entail the necessity of setting aside a smaller sum of capital to produce the income fee payable. That will no doubt result in some benefit to the ultimate beneficiaries, but that is a result of the testator's direction, and must be taken to be what the testator contemplated, and had in his mind.

In my judgment, the result of it all is that the withdrawal fee in the case of Mabel Clarence Price is a matter which does not concern the residuary estate at all, except in so far as the fund ultimately forms part of residue. If there are children of the annuitant who take, then they have to bear the withdrawal fee, and no question arises. With regard to the income, although I agree with Mr. Edwards that it is not a case of holding up the residue to produce a sum to pay the income fee in each of these three cases, nevertheless, it is the duty of the trustees, when they are setting aside a sum sufficient to produce these three annuities, to set aside a sum which will be sufficient to enable the annuitants to get their annuities without deduction of the income fee. Therefore, they must set aside a sum the income from which will be sufficient to pay the income fee as well as the annuity. I make a declaration to that effect.

Solicitors: *Merton Jones, Lewsey & Jefferies* (for all parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

PORT *v.* GRIFFITH.

[CHANCERY DIVISION (Luxmoore, J.), **January 12, 13, 1938.]**

Landlord and Tenant—Restrictive covenant—Restriction to particular trade—Right of landlord to let adjoining property for same or similar trade.

The defendants let a shop for a term of 21 years to the plaintiff, the latter covenanting to use and occupy the premises and to permit the same to be used and occupied as a shop for the retail business for the sale of wool and general trimmings, and for no other purpose without the consent in writing of the defendants. Some 6 years later, the defendants let the adjoining shop subject to a similar covenant, the business stated being for the sale of tailor and dressmaking trimmings and cloths. The plaintiff contended that this was a derogation from the grant of the lessor, as frustrating the purpose for which, in the contemplation of both parties, the premises were let to the plaintiff :—

HELD : it was not within the reasonable contemplation of the parties that the defendants were putting themselves under an obligation not to let their adjoining property to a trade rival of the plaintiff's.

[**EDITORIAL NOTE.** It will be noticed in this case that the covenant was restrictive of the tenant only, and that the landlord was not expressly restricted as to the way in which he might deal with his adjoining property. The case therefore is an attempt to imply a restriction upon the landlord from an express restriction placed upon the tenant.

AS TO USER OF ADJOINING PROPERTY BY LANDLORD, see HALSBURY, Hailsham Edn., Vol. 20, pp. 244, 245, para. 273 ; and FOR CASES, see DIGEST, Vol. 31, pp. 166-169, Nos. 2996-3019.]

Cases referred to :

(1) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476 ; 31 Digest 138, *2741* ; 76 L.J.P.C. 100 ; 97 L.T. 496.

(2) *O'Cedar, Ltd.* v. *Slough Trading Co.*, [1927] 2 K.B. 123 ; Digest Supp. ; 96 L.J.K.B. 709 ; 137 L.T. 208.

(3) *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, [1921] 1 Ch. 200 ; 31 Digest 132, *2663* ; 90 L.J.Ch. 140 ; 124 L.T. 418.

(4) *Browne* v. *Flower*, [1911] 1 Ch. 219 ; 31 Digest 135, *2703* ; 80 L.J.Ch. 181 ; 103 L.T. 557.

(5) *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437 ; 30 Digest 514, *1694* ; 63 L.J.Ch. 601 ; 71 L.T. 119.

(6) *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q.B. 836 ; 31 Digest 137, *2717* ; 63 L.J.Q.B. 661 ; 71 L.T. 362.

(7) *Herz* v. *Union Bank of London* (1854), 2 Giff. 686 ; 19 Digest 139, *943* ; 24 L.T.O.S. 137 ; *subsequent proceedings*, 24 L.T.O.S. 186.

(8) *Woodman* v. *Pwllbach Colliery Co., Ltd.* (1914), 111 L.T. 169 ; 19 Digest 13, *27* ; *affd.*, [1915] A.C. 634.

(9) *Pollard* v. *Gare*, [1901] 1 Ch. 834 ; 19 Digest 36, *184* ; 70 L.J. Ch. 404 ; 84 L.T. 352.

ACTION for a declaration that a lease granted by the defendants to one Julius Fisher was in derogation of the lease previously granted by the defendants to the plaintiff of property adjoining that demised to Fisher, and for damages for such derogation. The facts, with regard to which there is no substantial dispute, are set out in the judgment.

J. Norman Daynes, K.C., and *Roger W. Turnbull* for the plaintiff.

C. Romer, K.C., and *H. O. Danckwerts* for the defendants.

Daynes, K.C.: Two out of the five shops, forming part of No. 150, Mile End Road, Stepney, were let for a business which clearly competes with the business of the plaintiff to a very serious extent. There was no covenant in this case, and therefore the plaintiff's case is based upon derogation of grant. It is unjust that a landlord should let premises to a lessee for a particular business and then sterilise the grant by letting adjacent premises to another lessee in the same trade, thus making it impossible for the first lessee to get a living. If the court comes to the conclusion that there has been a derogation of grant, damages can be awarded. The plaintiff waited a year before bringing the action so as to see if any damage was suffered, and to what extent. The lessor is under an obligation not to frustrate the purpose for which in the contemplation of both parties the premises were leased. It is possible to have a case of partial frustration, and frustration will not be confined to physical acts. [Counsel referred to *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (1), *Woodman* v. *Pwllbach Colliery Co., Ltd.* (8), *Aldin* v. *Latimer Clark, Muirhead & Co.* (5), *Pollard* v. *Gare* (9), *Browne* v. *Flower* (4), *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.* (3).]

Romer, K.C.: In this case the plaintiff is trying to imply a restrictive covenant in the lease. This is an attempt to persuade the court to apply the doctrine of derogation of grant in a way in which it was never intended that it should be applied, and the action should be dismissed. [Counsel referred to *Browne* v. *Flower* (4).]

Danckwerts on the same side: The argument on behalf of the plaintiff means that, when a landlord knowingly lets premises to a tenant for a particular trade, the landlord impliedly guarantees to a tenant a monopoly of that particular trade in respect of any other property the landlord may have. Another strange feature about the proposition is that it is in effect a restriction in restraint of trade. It is a startling proposition that a man has restricted himself by some sort of obligation about which there has been no discussion at all. It is said that by implication he has restrained himself from competing with his tenant, although there has been no discussion of the matter and no attempt made to fix the limits of any covenant. Such an obligation cannot be implied either against the landlord or against anybody else. Even in the case of a vendor of a business the court will not restrain him from competing, unless he has entered into a covenant not to do so.

Daynes, K.C., in reply: The point that has been made that the restriction, if imposed, would be in restraint of trade is a bad one. The argument comes from one who is representing a landlord who has himself imposed a restrictive covenant. The question is: what is the implied promise? If a landlord who is dealing with a block of shops which forms one property takes a covenant which prescribes a particular trade to a tenant, it is the usual thing for the tenant to expect that he will not be subjected to competition from other tenants. The law laid down in the cases is wide enough to entitle the court to say that the plaintiff has proved her case for relief, if she can show that what has been done on the adjacent premises is a material interference with the covenant. If the court considers that there has been material interference, the law is now wide enough to enable the court to give the A plaintiff suitable relief. [Counsel referred to *Harmer* v. *Jumbil* (*Nigeria*) *Tin Areas, Ltd.* (3), *Browne* v. *Flower* (4).]

LUXMOORE, J.: The material facts in this case are as follow. The defendants were at all material times, and still are, the owners of property B in the Mile End Road, Hannibal Road, and Stepney Green, in the parish of Stepney, including premises known as 150, Mile End Road, which the defendants had, shortly before the date of the lease to the plaintiff, converted into five shops. By a lease dated July 9, 1935, the defendants demised one of these five shops, known as Shop No. 3, to the plaintiff C for a term of 21 years from Mar. 25, 1930. The lease contains, among other covenants, a covenant, in cl. 2 (13), to the effect that the lessee:

> will use and occupy the said demised premises and permit the same to be used and occupied as a shop for the retail business for the sale of wool and general trimmings and for no other purpose unless the lessors their agents or surveyors shall consent in writing to the use and occupation of the same or any part thereof for any other D purpose than specified.

In pursuance of this lease, the plaintiff entered into possession of Shop No. 3 and started to carry on there a retail business for the sale of wool and general trimmings, and she is still carrying on that business in the shop. On May 16, 1936, the defendants let Shops Nos. 4 and 5 to Fisher E for a term of 7 years from Mar. 25, 1936. Shop No. 4 adjoins Shop No. 3, and the lease contains in cl. 2 (11) a covenant by the lessee to this effect:

> The lessee will use and occupy the demised premises and permit the same to be used and occupied as a shop for the retail business for the sale of tailor and dressmaking trimmings and cloths and for no other purpose unless the consent there specified should be obtained.

F

When the plaintiff heard that the defendants proposed to let Shops Nos. 4 and 5 to Fisher for the retail business for the sale of tailor and dressmaking trimmings and cloths, she wrote to the defendants and protested against the letting, on the ground that this business was similar G to her own, and would be damaging to her. There was an attempt on the part of the defendants to prove by evidence that the two businesses were in fact different, and, while it is admitted that there is no similarity between what I might call the woollen branch of the plaintiff's business and the cloth branch of Mr. Fisher's business, I am satisfied that, so far H as the sale of trimmings is concerned, the two businesses are substantially the same.

The plaintiff founds her case on derogation from grant, and relies on a number of cases which lay down the principle that every lessor is under an implied obligation not to frustrate the purpose for which, in the contemplation of both parties, the premises in question were let.

My attention has been called to a number of cases, beginning with *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (1), in which this principle was laid down, and ending with the most recent decision, *O'Cedar, Ltd.* v. *Slough Trading Co., Ltd.* (2). The earlier of these authorities relate to cases where the frustration is due to some act which has physically affected the demised premises, but in *Harmer* v. *Jumbil* (*Nigeria*) *Tin Areas, Ltd.* (3), this principle was applied to a case in which the act done by the lessor and resulting in the frustration had no direct physical effect on the premises. In the present case, the plaintiff is, I think, asking the court to extend the principle still further. Of the authorities to which I was referred during the argument, the two most germane to the present case appear to me to be *Browne* v. *Flower* (4) and the *O'Cedar* case (2) to which I have just referred. In the former case, Parker, J., dealt with the earlier authorities, and it is unnecessary, I think, in view of his consideration of those cases, for me to refer to them in detail. In *Browne* v. *Flower* (4), the owner of a building containing flats let one of the flats, with rooms on the first and second floors, to a Mrs. Lightbody, and subsequently let a flat on the ground floor of the same building to the plaintiffs in the action. Mrs. Lightbody's agreement contained a clause prohibiting the use of her flat otherwise than as a dwelling-house, and the plaintiffs' agreement comprised a covenant for quiet enjoyment, and it stipulated that they should not use their flat otherwise than as a private residence. Each agreement contained a stipulation that the tenants would do nothing on the demised premises which might be a nuisance to the lessors or to the occupiers of adjoining premises, or which might tend to lessen the value thereof. Subsequently, Mrs. Lightbody sub-divided her flat, with the consent of the lessors, and, with the like consent, erected an iron staircase from the garden to an entrance to her flat on the first floor. That part of the flat and the staircase were let to another person later. The staircase was situated between the windows of two of the bedrooms of the plaintiffs' flat, and the fact that it was used as the only access to that part of the flat which had been let off by Mrs. Lightbody seriously affected the plaintiffs' privacy, as a person using the staircase could see directly into the plaintiffs' rooms. The plaintiffs brought the action to have the staircase removed, and for an injunction and damages. It appears that they put their case on two grounds: (i) the express covenant, and (ii) derogation from the grant. The second point is the only one to which I need refer. Parker, J., said, at p. 224:

> The plaintiffs next relied on the maxim that no one can be allowed to derogate from his own grant. This maxim is generally quoted as explaining certain implications which may arise from the fact that, or the circumstances under which, an owner of land grants or demises part of it, retaining the remainder in his own hands. The real difficulty is in each case to ascertain how far such implications extend.

After dealing with those cases in which the implication relates to easements or quasi-easements over the land retained, the judge continued, at pp. 225, 226:

> But the implications usually explained by the maxim that no one can derogate

> from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made.

He then referred to the cases of *Aldin* v. *Latimer Clark, Muirhead & Co.* (5), *Grosvenor Hotel Co.* v. *Hamilton* (6) and *Herz* v. *Union Bank of London* (7), to which I was also referred, and he continued, at p. 226 :

> In none of these cases would any easement be created, but the obligation implied on the part of the lessor or grantor would be analogous to that which arises from a restrictive covenant. It is to be observed that in the several cases to which I have referred the lessor had done or proposed to do something which rendered or would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made. I can find no case which extends the implied obligations of a grantor or lessor beyond this. Indeed, if the implied obligations of a grantor or lessor with regard to land retained by him were extended beyond this, it is difficult to see how they could be limited at all.

Then he states, at p. 227 :

> It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort.

Applying what was said by PARKER, J., to the facts of the present case, the question to be determined appears to be : Has the letting by the defendants to Fisher of Shops Nos. 4 and 5 rendered the plaintiff's Shop No. 3 unfit, or materially less fit, to be used for the purposes for which it was demised ?

The presence of a trade rival in premises next door to those occupied by the trader may, or may not, be a detriment to any particular business. I do not think that I should be justified in saying that the presence of a trade rival next door must of necessity be a detriment, but, whatever the view may be, the presence of a trade rival next door does not render the premises on which the trader is carrying on his business unfit for that purpose, although it may incidentally reduce the profit ratio to be earned in that business. It would be unreasonable to assume that, because the defendants let Shop No. 3 for the particular business described in the lease, the defendants were undertaking restrictive obligations which would prevent them from using or letting any of their other properties for any lawful purpose, which would include the carrying on of a rival business, and would compel them to insert a covenant restraining the carrying on of any business similar to the plaintiff's business in any subsequent lease of any of the property retained by them, for it would seem to me to be difficult to confine the case to those shops which are actually adjoining, or to draw a line defining which of the premises were to be subjected to such a restriction. As PARKER, J., said in *Browne* v. *Flower* (4), at p. 227 :

> Much as I sympathise with the plaintiffs, it would, in my opinion, be extending

> the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation.

Those words appear to me to be applicable to express my views with regard to the present case. In my judgment, the present case is, in substance, covered by the decision in *Browne* v. *Flower* (4).

The matter does not stop there, however, for that case was applied and followed by BRANSON, J., in the *O'Cedar* case (2), to which I have already referred. In that case, BRANSON, J., after referring to *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (1), and *Harmer* v. *Jumbil* (*Nigeria*) *Tin Areas, Ltd.* (3), said, at p. 127 :

> In the case before me, however, the purpose for which the premises were demised to the plaintiffs has not been frustrated by what has been done by the defendants. The plaintiffs can still conduct their business as they were able to before the surrendered premises were let to Davies.

He goes on to state the particular facts in that case, and points out that the question which it was necessary to consider was :

> whether the principle that a lessor may not derogate from his grant extends beyond cases in which the purpose of the grant is frustrated to cases in which that purpose can still be achieved albeit at a greater expense or with less convenience.

After referring to a number of cases, to which my attention was also called, he said, at p. 129 :

> The contention is that the defendants, by doing something on the adjoining land which is not in itself unreasonable or unbusinesslike, which has not affected the demised premises physically in any way, which has not rendered it less easy or less legal to carry on upon them the business for which they were demised, but which has had the effect of adding substantially to the expense of carrying on that business there, have derogated from their grant. I should be extending the application of the principle into a region quite different from that in which it has hitherto been applied if I were to hold that it applied to anything done by a lessor upon adjoining land which, while not otherwise affecting the demised premises or their user in any way, merely made it more expensive than it was before for the lessee to carry on his business on the demised premises. I do not think such a case comes within that principle at all.

He concludes by saying, at p. 130

> I cannot think that it was within the reasonable contemplation of the parties that the defendants were putting themselves under such an obligation to the plaintiffs as that contended for in this case.

In my judgment, the decision of BRANSON, J., applies, and governs the present case. I am unable to hold that it was within the reasonable contemplation of the plaintiff and defendants that the defendants were putting themselves and their remaining property under such an obligation to the plaintiff as that contended for by her. For these reasons, I think that the action fails, and must be dismissed with costs.

Action dismissed with costs.

Solicitors : *Jutsum, Jones, Arthur & Light* (for the plaintiff) ; *Gregory, Rowcliffe & Co.* (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

R. *v.* ROBINSON.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 17, 1938.**]

Criminal Law—Bigamy—Invalidity of second marriage ceremony apart from its bigamous nature.

The accused, being then a married man, in Sept., 1937, accompanied a woman to Scotland, and there in the presence of witnesses they declared themselves to be man and wife. Such a marriage by declaration is only valid in Scotland if one of the parties has been resident there for a period of 21 days, which condition was not fulfilled in this case. It was contended that, the second marriage ceremony being invalid, the offence of bigamy had not been committed :—

HELD : the validity of the second marriage was immaterial, and the accused was rightly convicted.

R. v. *Allen* (1) *followed.*

[**EDITORIAL NOTE.** The offence of bigamy consists in going through a ceremony of marriage at a time when a previous marriage is subsisting, and it is immaterial that the ceremony is invalidated by non-compliance with some condition governing its validity.

AS TO THE BIGAMOUS MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 9, p. 390, para. 658 ; and FOR CASES, see DIGEST, Vol. 15, pp. 740, 741, Nos. 7995-8006.]

Cases referred to :

(1) *R.* v. *Allen* (1872), L.R. 1 C.C.R. 367 ; 15 Digest 740, *7996* ; 41 L.J.M.C. 97 ; 26 L.T. 664.

(2) *R.* v. *Brawn* (1843), 1 Car. & Kir. 144 ; 15 Digest 740, *7995* ; *sub nom. R.* v. *Bawm,* 1 L.T.O.S. 528.

APPEAL from a conviction for bigamy at the Central Criminal Court by the recorder, a certificate for appeal being granted.

E. J. P. Cussen for the appellant.

Christmas Humphreys for the Crown.

LORD HEWART, L.C.J. (delivering the judgment of the court) : The case was that in Jan., 1937, the appellant was lawfully married in Coventry. He lived there for a little time, and in July, 1937, he left his wife. In the same month, he met a woman named Mabel Sarah Gray in Southend, and, on Sept. 25, the two of them left Southend by motor car for Scotland, in order to go through a form of marriage there. They arrived in Scotland on Sept. 29, and there in the presence of witnesses they declared themselves to be man and wife.

The appellant at the time of the ceremony signed a statement that he had resided in Scotland for at least 21 days immediately preceding Sept. 29, although, as Miss Gray knew, he had been in Scotland for only a day.

Evidence was given by a member of the Scottish bar that a marriage by declaration before witnesses was a binding marriage in Scotland, but that, owing to the condition of 21 days' residence in Scotland by one of the parties not having been complied with, this ceremony was void, and that, on application to the sheriff, it could not have been registered.

In that state of facts, it was argued in the court below that the offence of bigamy was not made out, and a certificate was obtained in reference to the question whether the form of marriage of Sept. 29, 1937, constitutes a second or bigamous marriage within the Offences against the Person Act, 1861, s. 57. A

In the course of the argument in the court below, reference was made to the case of *R.* v. *Allen* (1), where the law was very clearly explained after the case had been argued before a court consisting of no fewer than fifteen judges. The recorder, after his attention had been directed B to that case, used these words :

> I think the judgment of the court in Crown Cases Reserved delivered by COCKBURN, C.J., is very clear in expressing the guide which I ought to adopt in deciding this point. He says, at p. 375 of the case, the words " shall marry another person " may well be taken to mean " shall go through the form and ceremony of marriage with another person." C

The recorder went on to say :

> And it is, I think, clear that one has got to look to the purpose of the enactment, namely, the Act of 1861, and also to the mischief to be prevented and the remedy which the legislature intended to apply. The form adopted here quite clearly was recognised by the law as capable of producing a valid marriage, and the only reason D it turned out to be an invalid marriage was because the accused had failed to comply with this condition precedent, and the same thing might have happened between parties within the prohibitive degrees of consanguinity.

Nevertheless, the recorder somehow was induced to grant a certificate. The matter has really never been beyond doubt. It has not only been clear since 1872, but it was also made quite clear in the earlier case of E *R.* v. *Brawn* (2), where LORD DENMAN, C.J., said, at p. 145 :

> I am of opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases; as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime F of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify. . . .

It is quite obvious that this appeal must be dismissed, but, as this man was sentenced on Dec. 9, 1937, and as he appeals by leave, the result is that the time he has spent in prison as an appellant will count G towards the satisfaction of his sentence.

Appeal dismissed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) : *Director of Public Prosecutions* (for the Crown).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*] H

MITCHENER *v.* EQUITABLE INVESTMENT CO., LTD.

[KING'S BENCH DIVISION (Lawrence, J.), **January 13, 14, 1938.]**

Money—Moneylending—Memorandum of loan agreement—Loan secured by bill of sale—Reference to power of seizure and sale—Unconscionable contract—Moneylenders Act, 1927 (*c.* 21), *s.* 6.

The plaintiff entered into an agreement for a loan of £110 with the defendant company, who were registered moneylenders. The loan was to carry interest at 40 per cent. per annum and to be repayable in 12 monthly instalments of £6, the balance being repaid at the expiration of 12 months. The loan was secured by a bill of sale in the statutory form upon his furniture, which was valued at over £300. The loan was renewed over a period of years. After the first two years the plaintiff was in employment at £4 10*s.* per week and was in receipt of £1 10*s.* per week in respect of a sub-letting of part of his house. The memoranda of the original loan and the renewals stated that the loan was secured by a bill of sale, but did not refer in any way to the power to seize and sell the furniture. The memoranda of the renewed loans after the first did not state that the balance of the loan was repayable after the expiration of 12 months:—

HELD: (i) the memoranda were insufficient, as they did not specify the terms of the power of seizure and sale contained in the bill of sale.

(ii) the memoranda of the renewed loans after the first were insufficient, in that they did not state that the balance of the loan was repayable after the expiration of 12 months.

(iii) the contract was harsh and unconscionable and the interest should be reduced to 25 per cent. in respect of the first two years and 15 per cent. thereafter.

[**EDITORIAL NOTE.** It is here decided that the memorandum of a moneylending contract in cases where the loan is secured by a bill of sale must state the terms of the power of seizure and sale included in the bill of sale. This is so in spite of the fact that the bill is required by law to be in a statutory form.

AS TO SUFFICIENCY OF MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 23, pp. 190, 191, para. 280; and FOR CASES, see DIGEST, Supp., Money and Moneylending, Nos. 353a-353y.]

Cases referred to:

(1) *Westropp* v. *Equitable Investment Co., Ltd.*, unreported.

(2) *Reading Trust, Ltd.* v. *Spero, Spero* v. *Reading Trust, Ltd.*, [1930] 1 K.B. 492; Digest Supp.; 99 L.J.K.B. 186; 142 L.T. 361.

(3) *Stewart-Naylor* v. *London and Westminster Loan and Discount Co., Ltd.* (1937), unreported.

ACTION against a registered moneylender for (i) a declaration that the contract was unenforceable, (ii) an injunction to restrain the defendant company, the registered moneylender, from proceeding upon the contract, and (iii) a declaration that the transaction was harsh and unconscionable and that it should be reopened. The main issue was whether the memorandum required by the Moneylenders Act, 1927, s. 6 should specify the power of seizure and sale contained in the bill of sale securing the loan.

A. A. Pereira for the plaintiff.

Cyril B. Salmon and *D. C. L. Potter* for the defendant.

Lawrence, J.: The circumstances of the case are as follow: In 1928 Mitchener had had a draper's business, which had been unsuccessful, and he was offered employment in an advertisement business as a traveller on condition that he put a sum of money into the business, and he was anxious to borrow money for that purpose. Having seen an advertisement in the newspapers, he got into touch with the defendant company. The defendant company was fully informed by Mitchener of his circumstances and of the object of his borrowing money. They sent down one of their directors to investigate and to see Mitchener's house and furniture, in order to decide what money, if any, they would lend. The director inspected Mitchener's house, in which he then lived, and in which he has lived since, and inspected and made an inventory of the furniture, and afterwards offered to lend Mitchener £110. The furniture had been bought by Mitchener between the years 1920 and 1924 at a cost of £300. The offer of the defendant company to lend £110 was conditional upon Mitchener giving a bill of sale upon his furniture. The loan was then made in the year 1928 for £110, secured by a bill of sale upon Mitchener's furniture in his house at Dulwich, and the rate of interest which was specified in the contract comes out, according to agreement between counsel, at a rate of about 40 per cent. The loan was to be repaid at the rate of £6 per month, and the balance repayable at the end of twelve months. At the end of the first twelve months Mitchener was unable to repay the balance, and it was agreed that the contract should be renewed, the balance being treated as owing and forming part of the new loan of £110; so that Mitchener received at the end of the first year not a fresh £110, but £110 less the balance of the previous loan, and the rate of interest continued at the same figure. A memorandum of the first contract and the second contract signed by Mitchener was given to him, and it contained a term that the principal sum should be repayable at the end of twelve months. These contract renewals of this loan of £110 have continued yearly from 1928 up to the present time, when Mitchener got into arrears with the £6 monthly payments, apparently because he had taken advice and had been advised to dispute the contract. The defendant company thereupon threatened to exercise their power of seizure under the bill of sale. The ground upon which it is said that the contract is unenforceable is that none of the memoranda of the contracts contains any statement as to the power of seizure and sale under the bill of sale, which is said to be an infringement of the Moneylenders Act, 1927, s. 6 (2), which provides that the note or memorandum shall contain all the terms of the contract, and reliance is placed upon the judgment of **Branson**, J., in *Westropp* v. *Equitable Investment Company, Limited* (1) (that is the same defendant company as in this case), in which **Branson**, J., held, following what he considered to be the view of **Scrutton**, L.J., in *Reading Trust, Limited* v. *Spero* (2), at p. 505, that a contract similar to this moneylending contract, in which the memorandum did not specify the power of seizure

and sale under the bill of sale, was a memorandum which infringed sect. 6 of the Moneylenders Act, because it did not contain an onerous term which was in the bill of sale, and that the mere reference in the memorandum to the fact that the loan was secured by a bill of sale was not sufficient to comply with the terms of the statute. That judgment
A of BRANSON, J., has been followed by LEWIS, J., in one case certainly, and, as I gather, in two. It has certainly been followed in *Stewart-Naylor* v. *London and Westminster Loan and Discount Co., Ltd.* (3).

It was argued on behalf of the defendant company by Mr. Potter in his able argument that I am not bound by these decisions, and that I
B ought not to accede to their reasoning on the ground that the memorandum does state that the loan is secured by a bill of sale, and that the Bills of Sale Acts provide that the bill of sale shall be in a certain statutory form, and that that statutory form provides that no other powers of sale than those which are specified in sect. 7 of the Bills of Sale Act may be
C incorporated. In my judgment, that does not meet the point which was decided by BRANSON, J., because, although it is perfectly clear that a person who had before him a copy of the memorandum which stated that the loan was secured by a bill of sale would know, if he knew the law, as he is bound to know it, that no other power of seizure than one of those
D specified in sect. 7 of the Bills of Sale Act could be incorporated, he would not know which power of seizure was incorporated in the actual bill of sale, unless he saw the bill of sale. As those powers of seizure and sale are most material for the borrower to know, in my judgment it is an infringement of the Moneylenders Act, 1927, s. 6 not to specify in the
E memorandum the power of seizure and sale which the bill of sale referred to in the memorandum contains. In the present case it is clear that in all the memoranda of contracts there was no particular recitation of the powers of seizure contained in the bill of sale, and for that reason I am of opinion that the contract is unenforceable.

F There is a second ground upon which it is said that the contract is unenforceable. After the first two contracts, that is to say, the first contract and the renewal after the first year, the memorandum of the contract of loan specified that the loan was repayable by instalments of £6 per month, and did not state that the balance was repayable at the end
G of twelve months. It was argued for the plaintiff that that was not the true contract, and that, therefore, the memorandum did not state the terms of the contract. On behalf of the defendants it was contended, without calling any evidence, that the true contract was that stated in the memorandum, namely, that the loan should be repayable after the
H first two years by instalments of £6 per month, and that there was no term that it should be repayable at the end of the twelve months. Mitchener's evidence, which I accept, was that no such alteration of the contract was ever communicated to him; and the accounts and the way in which the contract was carried out show no alteration at that time. On the first renewal he was treated as owing the balance and on each subsequent renewal he was

treated as owing the balance, and he never received £110 on the renewal; he only received on each occasion £110 less the sum owing on the previous contract. I find, therefore, that the contract was never varied in the way that was suggested by the defendant company. It follows from that that the memoranda of the last five contracts do not state the terms of the contract and are unenforceable for that reason. That is sufficient to decide the case so far as the declarations and the injunction are concerned. There will be a declaration that the contract is unenforceable, and an injunction to restrain the defendants from seeking to enforce it.

There is then the third point, that the contract was harsh and unconscionable. As to that, I have stated the facts. Having regard to all the circumstances, I find that the contract was harsh and unconscionable and must be reopened. It appears to me that to lend a sum of money to a man in Mitchener's position on the security of furniture which he had bought for £300, and which I find was worth considerably more than the amount of the loan at the time the original loan was made, and to charge 40 per cent. interest is harsh and unconscionable. I think that Mitchener's position changed after the first two years of the contract. During the first two years of the contract he had had, although it was not shown that it was communicated to the defendants, an unfortunate business experience and at the time of the first loan he was borrowing money for the purpose of putting it into his advertisement business, which was also unfortunate; but thereafter he was engaged in a business in which he has been engaged ever since at a wage of £4 10*s*. a week, which was known to the defendants, according to Mitchener (and his evidence is not disputed), and also was getting 30s. a week from letting part of his house. I therefore think that these transactions ought to be reopened, but upon a different footing after the first two years. I accordingly reopen all the transactions upon the basis that Mitchener should pay 25 per cent. interest for the first two years and 15 per cent. thereafter.

Declaration that the contracts are harsh and unconscionable, and that, failing agreement between the parties, an account be taken and the sum found owing to the plaintiff—based on the excess over the £356 which has actually been paid, interest to be calculated at the rate of 25 per cent. for the first two years and 15 per cent. for the remaining years—be paid to the plaintiff. The account to be taken on the basis of the principal actually owing at any time. The counterclaim dismissed, the plaintiff to have the costs of the claim and counterclaim.

Solicitors: *Tudor & Rowe* (for the plaintiff); *H. Davis* (for the defendant company).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* HARLING.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and du Parcq, JJ.), **December 20, 1937.**]

Criminal Law—Rape—Consent of girl under 16 *years of age—Violence.*

To a charge of rape upon a girl under 16 years of age, the defence of consent is not open to the accused.

Where any resistance by a girl of such age would be futile, or where it is clear that the girl would not know whether to resist or not, the prosecution are not required to prove that the accused used force or violence.

[**EDITORIAL NOTE.** It is well settled that the defence of consent is not open to the accused. At the trial, however, there seemed to have been some doubt whether force or violence is not an essential ingredient of the offence. Rape has been defined as unlawful and carnal knowledge of a woman by force and against her will. Clearly, where a young girl in fact consented, there might be no force, although the law would not allow the question of consent to be questioned. It will be noted that, in cases of impersonation of a husband, or where the prosecutrix is a person of weak intellect, where also consent is not required to be proved, it is not necessary to prove violence. Having regard to the decision in this case, it would seem that in the case of girls under 16 years of age proof of violence is necessary, unless resistance was impossible, or the innocence of the child was such that she would not appreciate the necessity for resistance.

AS TO RAPE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 476-479, paras. 817-820; and FOR CASES, see DIGEST, Vol. 15, pp. 843-846, Nos. 9277-9307.]

APPLICATION for leave to appeal from a conviction for rape at the Leeds Assizes. The prisoner, aged 27 years, was indicted with rape for that he had carnal knowledge of a certain girl by force and without her consent, she then being under the age of 16 years. He stated in his defence that she understood what he was going to do and consented, and had had previous experience before she met the prisoner, but this was denied by the complainant. Before the case was opened, after a short discussion with counsel, HILBERY, J., ruled that:

> A charge of rape requires to be sustained by evidence which satisfies the jury first of all that there was carnal knowledge, secondly that it was by force, and thirdly that it was without consent. But a girl under the age of 16, being incapable in law of consent if the indictment be one for carnal knowledge, is also incapable in law of consent when the indictment is for rape; and therefore such defence is not open to the prisoner.

In the course of his summing up, HILBERY, J., said:

> The charge here is that this man did what is called in law rape. That means that he had carnal knowledge of this child by force, and by force without her consent. A child of 13½, in the eyes of the law, cannot consent. So in this case I tell you that there is no question at all whether she consented or not. But in order to constitute the offence of rape, although the child could not consent, the prosecution must satisfy you that he effected his purpose by overcoming such resistance as the girl offered, you being satisfied that she was offering resistance and that he was overcoming it. Did he convince you that no force was used to effect this purpose of having carnal knowledge of this child? If he did, then he is not guilty of rape, and you must acquit him. . . . Some children are of such an age that the mere fact that a man did it would mean that the man must have done it by force, because they would not know from what was happening whether to resist or not to resist.

The accused applied to the Court of Criminal Appeal for leave to appeal against conviction upon the ground of misdirection by the judge of the jury upon the law.

No counsel were instructed upon the application.

HUMPHREYS, J. (delivering the judgment of the court): This appellant, Ronald Harling, was convicted at the Leeds Assizes before HILBERY, J., of rape upon a girl of 13 years. He was sentenced to 5 years' penal servitude, and he now applies for leave to appeal against his conviction and sentence. In his grounds of appeal against conviction, he alleges misdirection of the judge to the jury. The facts of this case were that this child, who was referred to by the judge to the jury as being very obviously a weakling, and not very robust, was given a lift in the appellant's lorry, and they went into a wood together, and there according to the appellant's admission he had connection with the girl.

The question therefore in the case was whether the offence of rape being committed was clear beyond dispute though the appellant admitted that he had had carnal knowledge of a girl between 13 and 16 years of age. Some confusion appears to have arisen in the course of the trial between those two different offences. In the course of opening, the judge asked some questions of the prosecution which seemed to indicate that there was some doubt, and that the judge required some assistance as to the law. It appears, however, that, when the time came for summing up, he summed up in terms which are unexceptionable. He told the jury that the prosecution in order to prove the crime of rape must prove that connection by a man on a woman had taken place without her consent and against her will.

It is desirable for this court to say that which is not subject to doubt, though perhaps it may be useful to repeat it, that, while a girl under the age of 16 is perfectly capable of consenting to such an act, and, as everyone who tries these cases knows, they frequently do consent to sexual intercourse, the defence of consent is not open to a man, as the law says that a girl under such age is not capable of consenting. In every case of rape it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will. It may well be that in many cases the prosecution would not want more than the age of the girl, and in this case the age of the girl, coupled with the fact that the girl was a weakling, is enough to say that there was no consent on her part: and to say that the girl consented in this case is absurd. The judge said that this man was a strong, well-built man, and commented on the improbability of the girl being able to offer any resistance to him, and it is satisfactory to know that a proper direction was given to the jury. Therefore this application for leave to appeal must be dismissed.

With regard to the sentence, the crime of rape must always be regarded as a serious crime, and, when committed by a strong, healthy man on a child of 13 years in spite of that child's resistance, it becomes not only a bad offence but a horrible offence. The sentence of 5 years' penal servitude is not one day too long. The application for leave to appeal against sentence is also refused.

Solicitor: *Registrar of the Court of Criminal Appeal.*

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

HORNCHURCH URBAN DISTRICT COUNCIL *v.* WEBBER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 20, 21, 1938.**]

Highways—Streets—Making up—Premises to which access obtained from highway—Inclusion in apportionment—No resolution of local authority—Discretion of local authority—Private Street Works Act, 1892 (c. 57), *ss.* 7 (*e*), 10.

Certain private street works were being done in Hornchurch, where the provisions of the Private Street Works Act, 1892, had been adopted. It was alleged that the chief users of the street were the Essex County Council, who were the owners of a sanatorium which did not front, adjoin or abut on the street, but to which access was obtained from the street. The urban district council had not passed any resolution under sect. 10 of the Act of 1892, and the county council were not included in the provisional apportionment. Objection being taken to the apportionment before the justices, it was amended, and the urban district council were directed to serve a notice on the county council so that they might be made a party to the proceedings:—

HELD: upon the true construction of the Private Street Works Act, 1892, s. 10, it is in the sole discretion of the local authority whether or not they will pass a resolution that the matters therein referred to shall be regarded in the apportionment. If they do not pass such a resolution, no objection upon this head is maintainable before the justices, notwithstanding the provisions of sect. 7 (*e*). In the circumstances of this case, therefore, it was not open to the justices to entertain the objection made to this apportionment.

[**EDITORIAL NOTE.** Under the Private Street Works Act, 1892, s. 7 (*e*), it may be objected to a provisional apportionment "that any premises ought to be excluded from or inserted in the provisional apportionment." This wide statement, however, is here held not to control the operation of sect. 10. It is therefore a condition precedent to the inclusion of premises not fronting, adjoining, or abutting on the street, but access to which is obtained from the street, that the local authority shall pass a resolution for their inclusion. Whether or not the local authority pass such resolution is in the absolute discretion of the local authority, with which the court will not interfere.

AS TO EXCLUSION OF PREMISES FROM APPORTIONMENT, see HALSBURY, Hailsham Edn., Vol. 16, pp. 453, 454, para. 659; and FOR CASES, see DIGEST, Vol. 26, pp. 541, 542, Nos. 2391-2399.]

Cases referred to:

(1) *Oakley* v. *Merthyr Tydfil Corpn.*, [1922] 1 K.B. 409; 26 Digest 541, *2396*; 91 L.J.K.B. 345; 126 L.T. 320.

(2) *Bridgwater Corpn.* v. *Stone* (1908), 72 J.P. 487; 26 Digest 545, *2428*; 99 L.T. 806.

(3) *Chester Corpn.* v. *Briggs*, [1924] 1 K.B. 239 ; 26 Digest 547, *2447* ; 93 L.J.K.B. 69 ; 130 L.T. 221.

(4) *R.* v. *Minister of Health, Ex p. Aldridge*, [1925] 2 K.B. 363 ; 26 Digest 545, *2433* ; 94 L.J.K.B. 707 ; 133 L.T. 139.

(5) *Birmingham Corpn.* v. *Mother-General of Convent of Sisters of Charity of St. Paul* (1927), 91 J.P. 186 ; Digest Supp. A

APPEAL by way of case stated by the justices for the county of Essex sitting at Romford, raising the question whether certain premises, not fronting, adjoining or abutting a highway, should be included in a provisional apportionment as premises to which access was obtained from the highway. B

Sydney Turner, K.C., and *Percy C. Lamb* for the appellants.

Geoffrey C. Hutchinson for the respondents.

LORD HEWART, L.C.J. : This is a case stated by justices for the county C
of Essex sitting at Romford. The case arose in the following way : Certain objections were lodged by the present respondents, in purported pursuance of the Private Street Works Act, 1892, s. 7, to the proposal of the appellants to do certain private street works with respect to a certain street in the urban district of Hornchurch, and, those objections D
having been heard, the justices thought it right to adjourn the further hearing, in order to enable the appellants, at the request of the justices, to inquire of the Essex County Council whether they would make a voluntary contribution towards the expense of such works. The appellants, however, declined to comply with that request, on the ground that, until E
it was decided whether or not the Essex County Council should be included in the provisional apportionment, no useful purpose would be served by a conference, as the parties would not know what amount to assess on the remaining frontagers, as they are called. The statements which appeared in the notice of objection included these, that the Essex F
County Council should have been inserted in the provisional apportionment as owners of a certain sanatorium, and that the Essex County Council as chief users of the road, and according to the degree of benefit, should be included in the apportionment, and that, in the circumstances, the proposed works were unreasonable and the estimated expenses G
excessive. The justices, having heard the objection, amended the provisional apportionment, and directed the appellants to serve a notice on the Essex County Council so that they could be made party to the proceedings. From that decision the appellants, the Hornchurch Urban District Council, appeal in this case stated, and the question for us is H
whether, in taking the course they did, the justices came to a correct decision in point of law.

It appears from the facts found in the case that the Private Street Works Act, 1892, had been adopted by the appellants, and was in force in their urban district, that the appellants were the urban sanitary authority for the district, and that the appellants, by resolution of Oct., 1935, had resolved as follows:

> That in pursuance of the Private Street Works Act, 1892, the following street and part of a street within the sanitary district of the council be sewered, levelled, paved, metalled and made good and provided with proper means of lighting, and that the expenses of such works be apportioned on the premises fronting, adjoining or abutting on such street and part of a street regard being had to the greater or less degree of benefit to be derived by any premises from such works and that the surveyor do prepare in conformity with this resolution as respects each of the said streets a specification of the above-mentioned works with plans. . . .

It is found as a further fact that the Essex County Council were not included in the said apportionment, they having no premises fronting, adjoining or abutting on the street the subject of the resolution of Feb., 1937. It is further found:

> That the appellants had not at any time resolved to include in the said provisional apportionment any premises access to which is obtained from the street through a court passage or otherwise within the meaning of sect. 10 of the Act.

Then there are further findings with regard to the particular locality, and in the result the justices gave the direction to which reference has already been made. They directed that the premises of the Essex County Council:

> be included in the provisional apportionment and that such provisional apportionment be amended accordingly by inserting the said premises [with a certain liability.]

The question we have to decide here seems to me to be a fundamental question with regard to the true interpretation of this important Act of Parliament. The Act provides that, in certain circumstances, an urban authority may resolve, with respect to certain streets or parts of streets, to do certain works, and that the resolution may include several streets or parts of streets, or may be limited to a part. Thereupon it is provided that a specification is to be made, that an estimate of the probable expense is to be prepared, and that a provisional apportionment of the expenses among the premises liable to be charged therewith is to be prepared by the surveyor. Then it is provided by sect. 7 that certain objections may within a limited time be made by written notice served on the urban authority. The possible heads of objection are enumerated in various paragraphs numbered from letters (*a*) to (*f*), and afterwards in sect. 8 it is provided that the urban authority, after the expiration of a certain time:

> may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned. . . .

It is also provided that the court which hears those objections:

> may quash in whole or in part or may amend the resolution plans sections estimates and provisional apportionments or any of them on the application either of any objector or of the urban authority.

Also the court may adjourn, and if it thinks fit direct further notices to be given. By the clear terms of sect. 6 (1) of the statute, it is provided that, where an urban authority resolves to sewer, level, pave, etc., some street or part of a street:

> the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street.

In other words, the section, as it seems to me, prescribes in the clearest possible language a general rule which is to be followed unless something happens. That it is to be followed unless something happens is indicated by the words, "subject as in this Act mentioned." What do those words mean? They refer by anticipation to the provisions of sect. 10, which begins by saying:

> In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises.

In other words, applying the universal rule which has been laid down by sect. 6, this section goes on to say that, not only in the normal standard case shall the apportionment be by frontage, but also it shall be by mere admeasurement, it shall be according to the frontage of the respective premises, and then come the modifications which explain why the words "subject as in this Act mentioned" appear in sect. 6:

> But the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say,) (*a*) the greater or less degree of benefit to be derived by any premises from such works; (*b*) the amount and value of any work already done by the owners or occupiers of any such premises.

Up to that point, it seems to me to be quite manifest that the section is dealing with apportionment of expenses of premises fronting, adjoining, or abutting on the street, and it is giving express power to the local authority in the exercise of their discretion to resolve, if they think just, that apportionment by mere admeasurement of the frontage shall not be conclusive, but that, while the apportionment is still based upon frontage, regard may be had to the greater or less degree of benefit to be derived by particular premises which do front, adjoin, or abut, and regard may be had to the amount and value of any work already done by the owners or occupiers of any such premises—that is to say, of premises which do front, adjoin, or abut on the street. So far, it seems to me that there is really no possibility of error. Then come these words:

> They [the local authority] may also, if they think just, include any premises which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly.

The relation of that part of the section to what has gone before seems to me to be reasonably clear, and certainly, in my experience, it has always been interpreted as if it were reasonably clear—namely, that, just as the local authority, as a matter of discretion and policy, is permitted to vary the normal mode of apportionment by mere admeasurement of frontage to the extent of taking into account the benefit to be derived by particular premises, or the value of work done by the owners of particular premises, so also the local authority is empowered, in the exercise of its discretion and by resolution, to include premises which do not front, adjoin, or abut on the street. The matter would not, I think, be open to even a brief A argument if the word "resolve" had been repeated, but, looking at the collocation of these words in the statute, I have no doubt as to the meaning. The urban authority may, if they think just, resolve that, in settling the apportionment, regard shall be had to (*a*) or (*b*); they may also, if they think just, include any premises which do not front, adjoin, B or abut. In my opinion, the reference is to the resolution of the urban authority, whether made *uno flatu* or made at a different time, and that view was undoubtedly expressed in this court by LORD TREVETHIN, L.C.J., in *Oakley* v. *Merthyr Tydfil Corpn.* (1), at p. 422. In that case, the question was whether the authority had resolved to include the premises therein C referred to, and it was said that there was not an express resolution so to include them, but that the resolution which approved the provisional apportionment was a resolution approving an apportionment relating to them. LORD TREVETHIN, L.C.J., said, at p. 422:

> It must be borne in mind that two resolutions are contemplated by the Act. D There is the resolution under sect. 6, which is the initiation of the proceedings. It will be observed that this first resolution is one which need not be published, and which concerns the council itself. It may well be that at the time they pass such a resolution a council are not aware of any premises which are not fronting, adjoining, or abutting on the street, but access to which is obtained from the street through a court, passage, or otherwise. The surveyor, however, when set in motion has duties under sect. 6 (2), and he may draw the attention of the council to such houses as above-mentioned by including them in his specification estimate and pro- E visional apportionment. It then becomes the right of the council to pass a second resolution under sect. 6 (3), approving the provisional apportionment, which includes such houses, but this they can only do if they think it just to include such houses. This second resolution was passed in the present case, and from the fact that the council have included the houses in Awelfryn Terrace it must be assumed that they thought it just to do so. We think it would be more in conformity with the provisions of the Act that the resolution should state expressly that the council "think it just to include" such houses. For the purposes of persons objecting this is the F really important resolution, because it has to be published so that objection may be made.

That was a unanimous decision of this court, the considered judgment of the court, which consisted of LORD TREVETHIN, L.C.J., SANKEY and ACTON, JJ. That case seems to me—even if it stood alone, as it does G not—to make it perfectly plain that the question whether the premises which do not front, adjoin, or abut are to be included is a question of policy and discretion for the local authority. They may also, if they think just, include these premises, as they may, if they think just, resolve that the apportionment by mere admeasurement shall be supplemented and H corrected. A similar view of the construction of the section has been referred to, and frequently assumed, in other cases. So, for example, in *Bridgwater Corpn.* v. *Stone* (2), where the headnote states that it was held:

> In the absence of a resolution by the urban authority under sect. 10 of the Private Street Works Act, 1892, that the apportionment of the expenses of making up a

> street is to be otherwise than according to frontage, the justices have no jurisdiction under sect. 8 (1) of the Act on the hearing of objections to the provisional apportionment to reduce the apportionment in respect of the degree of benefit to be derived by any premises, or of the amount and value of any work already done by the owners or occupiers.

In that case, it was found as a fact that the appellants did not resolve that, in settling the provisional apportionment, regard should be had to any consideration other than the frontage of the respective premises fronting, adjoining, or abutting on the street, and, notwithstanding the absence of that resolution, the justices believed themselves to be empowered to alter and amend the provisional apportionment as if that resolution had been passed. LORD ALVERSTONE, L.C.J., delivering judgment, in which BIGHAM and WALTON, JJ., concurred, said, at p. 489 :

> It seems to us that Mr. Naldrett [for the appellants] is right in saying that the authority to decide whether the apportionment is to be based on any other consideration than that of frontage, is not the magistrates but the urban authority who, under sect. 10, can pass a resolution that the apportionment shall be otherwise than according to frontage. That that was meant to be left to the urban authority is also confirmed by sect. 7 (*f*) which refers to the objections that an owner may take. [His Lordship read sect. 7 (*f*).] That indicates that that objection can only be raised where there has been a resolution that the apportionment is to be otherwise than by frontage. Therefore the justices had no jurisdiction to cut down the frontage to the hypothetical figure of 16 ft. ; and therefore they exceeded their jurisdiction. In the absence of a resolution, which the urban authority might have passed, the respondents' remedy is by appeal to the local government board under the Public Health Act, 1875, s. 268.

It is quite true that that decision is in terms a decision to the effect only that it is a matter for resolution of the urban authority, if they think just, to depart from the mere apportionment according to the admeasurement of the frontage. In my opinion, *mutatis mutandis*, the words apply to what is provided in the section equally as to the power of the local authority, if they think just, also to include premises which do not front, adjoin, or abut. I shall not enter in detail into the other cases, nor refer to many cases which do not appear to have found their way into the books, but there are passages in *Chester Corpn.* v. *Briggs* (3), *R.* v. *Minister of Health, Ex p. Aldridge* (4), and *Birmingham Corpn.* v. *Mother-General of Convent of Sisters of Charity of St. Paul* (5), which, in my opinion, support that view.

The ingenious and able argument which has been presented to us by Mr. Hutchinson in this case is founded upon the fact that, in setting out the possible heads of objection to proposed works, a matter dealt with in sect. 7 of this statute, the legislature has provided, among other things, that the objector may say, if he thinks fit, under the heading (*e*), that any premises ought to be excluded from, or inserted in, the provisional apportionment ; and the argument is that those are apt words to enable an objector to say that the apportionment, if it had properly been made, would have had regard to premises which do not front, adjoin, or abut on the street. In my opinion, that is a fallacy. Those words have a manifest and obvious meaning with reference to the ordinary case where apportionment takes place according to frontage, whether it be according to mere admeasurement or according to measurement of frontage supplemented and corrected by regard to benefit received or work done. It may well be that a particular person might say: "You have included premises which ought not to be included; you have failed to insert premises which ought to be inserted." But I cannot get from that possible head of objection any ground for believing that, after the statute has used the words, "they," that is, the local authority, "may also, if they think just, include" a wholly new class of premises—to wit, premises which do not front—side by side with premises which do, that objection entitles a person to say before the justices that the justices have jurisdiction in effect to order the local authority to come to the conclusion to which, according to that argument, they ought antecedently to have come, that it was just to include that class of premises. It seems to me that that is to ignore the plain meaning of the words in the last paragraph of sect. 10 of this statute: "They may also, if they think just, include," following closely as they do upon the words "may, if they think just, resolve that in settling the apportionment regard shall be had . . ." The argument is really, in my opinion, an endeavour to re-write this section, and it involves, as the course of the argument has shown, the remarkable conclusion that, if a local authority is minded to depart, not indeed from the normal rule of apportionment according to frontage, but from the normal rule of apportionment according to frontage by mere admeasurement, and to have regard to one of these other matters, it must have regard to all. The argument is that, by deciding, if it does decide, to have regard to the degree of benefit received, or to the value of work done, it has rid itself of the universal rule about the basis of apportionment, and then, willy-nilly, it has opened every door. If it decides that it is right to have regard to benefit received, then it must have regard to the value of work done, and, if it decides to have regard to either of those things in respect of premises which do not front or adjoin or abut on a street, then *ipso facto* the local authority must include, whether the local authority thinks it just or not, premises which do not front, adjoin, or abut. Whatever may be the merits of such a provision—and I have grave doubts about them—I cannot find them within the four corners of this section. On the contrary, they seem to me to be a clear contradiction of the plain language of the section, and the argument would never be made possible but for the inclusion under the conceivable heads of objection of objection (*e*), that any premises ought to be excluded from, or inserted in, the provisional apportionment. In my opinion, those words clearly mean that, the basis of the apportionment being what it is, according to the resolution of the local authority, an error has been made in the exclusion or in the insertion of particular premises, but the whole argument is within the four corners of the provisional apportionment on the basis resolved upon by the local authority. It does not open the door to the justices to say: "Although the local authority have not arrived at the opinion that this other course is just, we will tell them that they ought to have done so, and we will amend this apportionment as if they had." Mr. Hutchinson, in the course of his persuasive argument, laid great stress on the expression in the last paragraph of sect. 10: "They may also, if they think just, include any premises which do not front." That, he says, imports an element of quasi-judicial deliberation and determination, but exactly the same words appear above :

> The urban authority may, if they think just, resolve that in settling the apportionment, regard shall be had to [benefit or value of work done]

There is clear and express authority upon the point that, if they refrain from passing a resolution of that kind, no court can tell them that they must, nor behave as if they had. I have no hesitation in expressing the view myself that, although it is highly desirable that administrative acts should not be permitted to encroach upon the field of judicial decision, I cannot, on these words in this section, say that judicial decision can operate to compel an administrative act to be done which has not been done, or to treat the matter as if it had been done.

In my opinion, when one looks at the clear words of the section, or at the cases which have been decided with reference to it, it is apparent that these justices mis-read the section, and that they gave directions and caused amendments to be made which they had not jurisdiction to cause nor to make. I think, therefore, that this appeal ought to be allowed.

BRANSON, J. : I agree, but, as I have arrived at that concluion with some hesitation, I think it right that I should express in my own words the reasons which have brought me to that opinion. The real question, as I see it, upon the construction of the sections is this. It is clear that under the sections some right of appeal, some power of altering decisions, has been given by statute to the justices, and the real question is : To what extent has that power which has been given to the justices gone ? If one looks at sect. 8 (1), which is the section giving the justices powers of dealing with the matter, one finds their powers expressed in the widest terms :

> The court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority.

It would be difficult to conceive of more complete powers of dealing with the matter in hand than the powers so expressed to be given, but then one must, I think, look at sect. 7 in order to see whether that section has not put limits to the powers conferred under sect. 8. One finds there that this appeal can be taken only upon notice of objections, and one finds also the provision that those objections must be on one or other of the grounds set forth in subparas. (*a*) to (*f*) of that section. Then it is said that in this particular case the objector brings himself within the express language of sect. 7 (*e*). He is objecting that certain premises—to wit, the premises of the Essex County Council—should be inserted in the provisional apportionment, and, unless there is something in the frame-work of these sections, or unless one is bound by authority, it would appear that the statute has given power to raise this very objection which we find in the present case.

With regard to that, I find first of all that this court in *Bridgwater Corpn.* v. *Stone* (2) has given a decision which seems to show that, in spite of the arguments which had been stated with regard to the ambit of the appeal, no appeal to the justices was possible, except in circumstances which do not apply to the present case. It is said there that, unless the urban authority have under sect. 10 passed a resolution resolving that, in settling the apportionment, regard shall be had to some consideration other than mere frontage, no consideration can be urged before the justices that greater or less degree of benefit should be allowed to affect the apportionment, or the amount or value of work already done by owners or occupiers of premises. That leads one to examine the sections afresh, in order to see whether there is not some criterion which is decisive of the case. Giving, of course, the greatest possible respect to the authority of *Bridgwater Corpn.* v. *Stone* (2), and upon consideration, I have come to the conclusion that there is such criterion, and that the matter may be stated in the following way: Under sect. 6 and sect. 10 read together, the Act provides for a statutory method of apportioning the expenses of works done under those sections, and, if the matter simply remains without any resolution of the urban authority, there is a statutory method of apportionment which nobody can alter. If that method is in operation, all that any objector can say is that that method is not the proper one—in other words, that some premises which have a frontage and which therefore ought to be included, have been left out, or that some premises have been excluded which have a frontage, and ought therefore to be inserted. If the urban authority chooses to exercise the discretion given to them by the words of sect. 10, saying that they may, if they think just, resolve that, in settling the apportionment, regard shall be had to the considerations (*a*) or (*b*), then of course objections that those considerations have not been properly regarded can be made, and that is provided for by sect. 7 (*f*). I think that it is very material to bear in mind that the legislature thought it necessary to give express power to frame an objection upon that ground, and to limit it to cases:

> where the provisional apportionment is made with regard to other considerations than frontage as hereinafter provided.

Exactly the same considerations seem to me to apply to the other discretion which is given to the justices—namely, the discretion, if they think it just, to include premises which do not front, adjoin, or abut. If they take that course, and exercise that discretion, then anybody who is affected can appeal to the justices, and can say that their property does not receive access, or for any other reasons does not come within the class of property over which this discretion has been given to the urban authority. It seems to me, however, that it would not be right for us to say that, because, as in this case, the urban authority has resolved that the apportionment shall have regard to the greater or less degree of benefit to be derived by any premises from such works, that in any way authorises the justices to exercise for the local authority its discretion under the remaining portions of the section, and to order that premises which do not front, adjoin, or abut should be included in the apportionment.

For these reasons, the doubts with which I had regarded this case during a considerable part of the argument have been resolved, and I think that, not only upon the authority of *Bridgwater Corpn.* v. *Stone* (2), and the other cases that have been referred to by Lord Hewart, L.C.J., but also treating the matter for myself as *res integer*, this appeal should be allowed.

Humphreys, J.: I agree, and I cannot usefully add anything to the judgments that have been delivered.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellants); *Candler, Sykes & Dore*, agents for *Leonard Gray & Co.*, Chelmsford (for the respondents.)

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

MILLS *v.* DUCKWORTH.

[Court of Appeal (Greer and MacKinnon, L.JJ., and Bennett, J.), **January 20, 1938.**]

Practice—Action for damages for negligence—Judgment for plaintiff—Money taken out of court—Whether plaintiff can appeal on quantum of damages.

The plaintiffs in an action for damages for negligence obtained a judgment in their favour. They took the amount awarded out of money which had been paid into court, and then appealed on the quantum of damages. It was contended that, having taken money out of court, and thereby approbated the judgment, they could not now reprobate it by appealing:—

Held: the plaintiffs were entitled to appeal. It could not be said that, by appealing as to quantum of damages, they were reprobating the judgment.

[**EDITORIAL NOTE.** There are a number of authorities which establish the proposition that a person cannot take the benefit of an award and afterwards dispute its validity. It was here attempted to extend this principle to the case of a person who has obtained a judgment for damages and has taken the amount awarded out of a larger sum paid into court. It is contended that such a person cannot afterwards appeal against the quantum of the damages. The principle is founded upon the fact that the court will not allow a person to approbate and reprobate an award, but it is held that appealing against the quantum of damages is not a reprobation of the judgment.

As to Appeal on Quantum of Damages, see HALSBURY, Hailsham Edn., Vol. 10, pp. 153-155, paras. 195-198; and for Cases, see DIGEST, Vol. 17, pp. 164-179, Nos. 648-833.]

Cases referred to:

(1) *Johnson* v. *Newton Fire Extinguisher Co., Ltd.*, [1913] 2 K.B. 111; 34 Digest 479, *3947*; 82 L.J.K.B. 541; 108 L.T. 360; 6 B.W.C.C. 202.

(2) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

(3) *Verschures Creameries* v. *Hull & Netherlands S.S. Co.*, [1921] 2 K.B. 608; 21 Digest 226, *593*; 91 L.J.K.B. 39; 125 L.T. 165.

(4) *Strange* v. *Davis Gas Stove Co., Ltd.* (1915), 9 B.W.C.C. 111; 34 Digest 480, *3952*.

(5) *Josey* v. *Vincent* (1916), 9 B.W.C.C. 474; 34 Digest 479, *3949*.

(6) *Harris* v. *Minister of Munitions* (1920), 90 L.J.K.B. 1312; 34 Digest 480, *3953*; 124 L.T. 489; 13 B.W.C.C. 324.

(7) *Reeves* v. *Smith (S.) & Sons* (1922), 15 B.W.C.C. 190; 34 Digest 480, *3954*.

(8) *Walden* v. *Gramophone Co., Ltd.* (1927), 20 B.W.C.C. 346; Digest Supp.

(9) *Malcolm* v. *Barber, Walker & Co., Ltd.* (1927), 137 L.T. 470; Digest Supp.; 20 B.W.C.C. 516.

(10) *Jones* v. *Smith*, [1936] 1 All E.R. 661; Digest Supp.; 29 B.W.C.C. 75.

APPEAL from a decision of LORD HEWART, L.C.J., at the Sussex Assizes, held at Lewes, dated Mar. 16, 1937.

R. P. Croom-Johnson, K.C., and *G. A. Thesiger* for the appellants.

J. D. Cassels, K.C., and *M. Berryman* for the respondent.

Cassels, K.C.: The appellants have taken money under this order, and have therefore approbated it. One cannot take the benefit of an order and at the same time appeal from it. If they were satisfied with the order, they must remain satisfied, and not appeal; if they were going to appeal, then they should not have acted upon the order. So with a will, one cannot benefit under it and then contest it. [Counsel referred to *Evans* v. *Bartlam* (2), *Verschures Creameries* v. *Hull & Netherlands S.S. Co.* (3), *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1), *Strange* v. *Davis Gas Stove Co., Ltd* (4), *Josey* v. *Vincent* (5), *Harris* v. *Minister of Munitions* (6), *Reeves* v. *Smith (S.) & Sons* (7), *Walden* v. *Gramophone Co., Ltd.* (8), *Malcolm* v. *Barber, Walker & Co., Ltd.* (9), and *Jones* v. *Smith* (10).]

Croom-Johnson, K.C.: In *Johnson's* case (1), the question was the want of jurisdiction of the trial judge. The other cited cases were cases of awards under the Workmen's Compensation Act, where workmen had taken the benefit awarded and had then appealed from the award. They are not relevant here. [He was stopped by the court.]

GREER, L.J.: A preliminary point has been taken in this case which, in my judgment, would revolutionise the proceedings of an appeal and involve the conclusion that we have been doing for many years things we are not competent to do. The material facts as regards the preliminary point in this case are these. There was an action for damages brought by the father and the mother of a deceased journalist, who claimed that they were very grievously affected in respect of the pecuniary loss they had sustained by reason of the death of their son, which they alleged was due to the negligence of the defendant. The case came on for trial. Negligence at the trial was not disputed, and the

only question was a question raised by para. 4 of the defence, to which the judge found, contrary to the contention of the defendant, that there was no defence at all. The judge awarded a small sum. There having been a large sum of money paid into court (paid in quite recently), counsel for the defendant agreed with counsel for the plaintiffs that they should have costs, including the costs of the trial because of the A
late date at which the money had been paid in, and there was the one point of any importance to be attached to the difference in what the costs would have been if they got all the costs and what they would have been had they got only the costs up to the date of payment in, which probably would not have given them all the costs of preparing B
the briefs. That was done by agreement. Thereupon an order was made in respect to the amount paid into court, and paid into court without the particulars which are required by the rules, that the plaintiffs should specify in respect of which cause of action the payment in was made, there having been here two causes of action, one under Lord C
Campbell's Act, and the other under the Law Reform (Miscellaneous Provisions) Act.

It is said that, by reason of a number of judgments—one of which is reported in the Law Reports and a number in Butterworth's Compensation Cases—where the procedure is by way of obtaining an award, those D
judgments are binding in the present case, and prevent this court from considering an appeal in respect of the quantum of damages, because the appellants had accepted the damages while at the same time they had said by their notice of appeal, and entered the appeal on the ground that, the damages were inadequate. I agree that, if their contention E
in the Court of Appeal had been that the judge had no jurisdiction to make any judgment in favour of the plaintiffs, then, if the plaintiffs had taken the money which the invalid award gave them, they could not afterwards come to the Court of Appeal and say: "We have money which has come to us under an award which we now ask you to F
say is invalid." Having taken benefit under an invalid award, it is quite obvious that they cannot come to the Court of Appeal and say that that is an award which has to some extent benefited them, and which is to some extent invalid. Our attention has been called to the facts and contentions in *Johnson* v. *Newton Fire Extinguisher Co., Ltd.* (1), which is G
the foundation of all the subsequent cases, and it is quite clear that that was a case in which it was being alleged that the award was invalid. On that ground, it was held that, having accepted money under an award which he wished to say was invalid and improper, the plaintiff could not then appeal against the award under which he received the money, H
and the cases are explicable on that basis. To my mind, it would seem to bring about a most extraordinary injustice if it were to be held that, because a plaintiff, having got a judgment in his favour was saying as regards that judgment, "The money awarded to me is not as much as I am entitled to," and because he had accepted less than he was entitled to,

he could not come to the Court of Appeal and allege that he should have had more. As I have said, I think that that would revolutionise the practice of this court. Where that is what has been done, it seems to me to be entirely ill-founded, especially where, at the time the money which the plaintiff is alleging is too little is taken, he has told the defendant, in so many words, by his notice of appeal: "I say that, although I have got something for the judgment, I have not had all to which I am entitled, and am going to the Court of Appeal to ask them to give me some more. I am not blowing hot and cold. I am accepting the judgment of the trial judge, as far as it goes, but I say that it does not go far enough. I want something more." He said: "I am not going to blow hot and cold. I am going to blow hotter. On the decision by the trial judge, I want to blow a little hotter." Broadly speaking, and without going in detail into the cases, I think that we must dismiss this preliminary point and hear the appeal.

MacKinnon, L.J.: I agree, and do not think it is necessary to add anything, because I think it is so bad a point that it needs no further consideration.

Bennett, J.: I also agree.

Preliminary point dismissed.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellants); *William Charles Crocker* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

ILLUSTRATED NEWSPAPERS, LTD. *v.* PUBLICITY SERVICES (LONDON), LTD.

[Chancery Division (Crossman, J.), **January 13, 14, 17, 18, 19, 20, 1938.**]

Trade Marks & Trade Names—Passing off—Insertion of advertising matter in illustrated newspapers by means of a supplement—Misrepresentation for trading purposes.

The defendant company, carrying on business as advertising specialists, commenced an advertising scheme by circulating weekly, free of charge, in a large number of hotels, the current numbers of several well-known weekly illustrated newspapers containing a four-page advertising inset, produced by themselves, and affixed in the centre of each journal by a special locking device preventing removal. The inset contained advertisements sent to them by contributors to the scheme, certain fixed prices being charged to such advertisers. The insertions were made without the authority of the plaintiff company, who claimed an injunction to restrain the defendant company from passing off copies of their altered periodicals as and for new and unaltered ones:—

Held: (i) the acts of the defendant company were calculated to lead the trade and the public to believe that the four-page inset was part of the publication as originally published by the plaintiff company, resulting in a possible loss to them of their advertising contributors and a reasonable risk of litigation with other contributors, and the plaintiff company were entitled to an injunction.

(ii) the plaintiffs were entitled to the injunction, although since the issue of the writ the defendants had offered to give the plaintiffs all they required.

[**EDITORIAL NOTE.** This case is of importance from two points of view. The first is that, by inserting an inset of the nature here complained of, the defendants were held to be representing that the inset was part of the advertisements of the journal itself; and, in this respect, it was also held to be immaterial that there was no one who could be said to be a purchaser in the ordinary sense of the word. The second is that it is sufficient to support an injunction if such representations are likely to cause damage to a plaintiff's goodwill, and actual damage need not be proved.

AS TO PASSING OFF, see HALSBURY, 1st Edn., Vol. 27, Trade Marks, pp. 765-767, paras. 1348-1350; and FOR CASES, see DIGEST, Vol. 43, pp. 305-317, Nos. 1287-1386.]

Cases referred to:

(1) *Spalding & Brothers* v. *Gamage (A. W.), Ltd.* (1915), 84 L.J.Ch. 449; 43 Digest 264, *1018*; 32 R.P.C. 273.

(2) *Samuelson* v. *Producers Distributing Co., Ltd.*, [1932] 1 Ch. 201; Digest Supp.; 101 L.J.Ch. 168; 146 L.T. 37; 48 R.P.C. 580.

(3) *Reddaway* v. *Banham*, [1896] A.C. 199; 43 Digest 277, *1098*; 65 L.J.Q.B. 381; 74 L.T. 289; 13 R.P.C. 218.

(4) *Walter* v. *Ashton*, [1902] 2 Ch. 282; 43 Digest 283, *1135*; 71 L.J.Ch. 839; 87 L.T. 196.

(5) *National Telephone Directory Co.* v. *Dawson Manufacturing Co.* (1924), 263 South Western Reporter, 483.

(6) *Society of Accountants & Auditors* v. *Goodway & London Assocn. of Accountants, Ltd.*, [1907] 1 Ch. 489; Digest Supp.; 76 L.J.Ch. 384; 96 L.T. 326.

(7) *Singer Manufacturing Co.* v. *Wilson* (2) (1865), 5 New Rep. 505; 36 Digest 807, *2903*; 12 L.T. 140.

(8) *Singer Manufacturing Co.* v. *Loog* (1882), 8 App. Cas. 15; 43 Digest 264, *1019*; 52 L.J.Ch. 481; 48 L.T. 3.

(9) *Dental Manufacturing Co., Ltd.* v. *De Trey (C.) & Co.*, [1912] 3 K.B. 76; 43 Digest 319, *1402*; 81 L.J.K.B. 1162; 107 L.T. 111; 29 R.P.C. 617.

(10) *Ormond Engineering Co. Ltd.* v. *Knopf* (1932), 49 R.P.C. 634; Digest Supp.

(11) *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900), 18 R.P.C. 95; 32 Digest 205, *2551*.

(12) *Clark (C. & J.), Ltd.* v. *Clark's Shoe Service* (1935), 52 R.P.C. 254; Digest Supp.

(13) *Wright & Green* v. *Ransom, Julius & Co.* (1902), 47 Sol. Jo. 92; Digest, Practice, 876, *4165*.

ACTION by the plaintiff company for an injunction, restraining the defendant company, their servants and agents, (i) from passing off altered copies of the plaintiff company's publications as and for new and unaltered copies issued by the plaintiff company, and from doing any acts such as would lead to any passing off as aforesaid, and (ii) from inserting or binding into the plaintiffs' publications matter which had not been authorised by the plaintiffs and publicly distributing the same in such a way as to hold out the plaintiffs as responsible for such added matter.

C. R. R. Romer, K.C., and *Geoffrey W. Tookey*, for the plaintiff company: The plaintiffs maintain that they are held out to be responsible for the added advertising matter. A sale is not necessary in an action for passing off. The article may be hired, or it may be given away. All that is necessary is that the representation is made for trading purposes. The misrepresentation here is being made to the class of persons to which these publications are addressed and upon which the plaintiffs rely for further support in the exploitation of their business. It is done for trading purposes, damages their property, and is not a domestic matter. [Counsel referred to *National Telephone Directory Co.* v. *Dawson Manufacturing Co.* (5), *Spalding & Brothers* v. *A. W. Gamage, Ltd.* (1), *Samuelson* v. *Producers Distributing Co., Ltd.* (2), *Walter* v. *Ashton* (4), *Society of Accountants & Auditors* v. *Goodway & London Assocn. of Accountants, Ltd.* (6), Kerr on Injunctions, 6th Edn., p. 335, and Kerly on Trade Marks, 6th Edn., p. 544.]

F. E. Bray, K.C., and *E. Holroyd Pearce*, for the defendant company: These goods are not for sale or disposal in any kind of way. They are hotel copies which have become second-hand goods and are not offered as new copies. The alleged injury cannot arise until the person who is supposed to be deceived looks at the pages which have been put in. The goods are in a cover with which people would not suppose the plaintiffs were connected. There is a notice at the top of the page, and the fact that it may be comparatively inconspicuous is unimportant. Anyone who wants to know has the means of finding out that it is not published by the plaintiffs. The action of passing off is an action for invasion in an element of goodwill. The invasion must consist in something which will induce a third party to alter his position by a false representation. This is no one here equivalent to a purchaser or client, the person whose state of mind is, in all the reported cases on passing off, the question at issue. [Counsel referred to *Singer Manufacturing Co.* v. *Wilson* (2) (7), *Singer Manufacturing Co.* v. *Loog* (8), *Spalding & Brothers* v. *A. W. Gamage, Ltd.* (1), *Reddaway* v. *Banham* (3), *Dental Manufacturing Co., Ltd.* v. *C. de Trey & Co.* (9), *Ormond Engineering Co., Ltd.* v. *Knopf* (10), *Walter* v. *Ashton* (4), *Samuelson* v. *Producers Distributing Co., Ltd.* (2), *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (11), *C. & J. Clark, Ltd.* v. *Clark's Shoe Service* (12), *Wright & Green* v. *Ransom, Julius & Co.* (13).]

Romer, K.C., in reply.

Crossman, J.: The plaintiffs in this action are the publishers of six illustrated newspapers—namely, The Tatler, The Sketch, The Illustrated London News, The Sphere, The Bystander, and The Illustrated Sporting and Dramatic News. These publications have been carried on for many years, The Illustrated London News, which is the oldest of them, having been founded in 1842, and The Bystander, which is the youngest of them, having been founded in 1903. The plaintiffs derive revenue from these publications in two ways: (i) from the sale of copies of the publications, and (ii) from the sale of advertising space in the publications. The publications are well known and widely circulated, and have a high reputation. The plaintiffs have a settled policy as to their advertisements, and they lay down conditions on which they insert advertisements, and these conditions are strictly adhered to by the plaintiffs.

The defendants, who were incorporated in 1936, carry on business as advertising specialists. Prior to the issue of the writ in this action, the defendants commenced an advertising scheme, in pursuance of which they sent out certain letters. These, I understand, were produced by the defendants. The first of them is a letter headed "Publicity Services (London), Ltd." It then sets out the names of the directors, and says "Advertising contractors and publishers." The letter says:

> Dear Sirs, We now have pleasure in submitting details in confirmation of the proposition outlined to you. We have a concession with seventy-five west end hotels, see rate card, to supply them with current copies of THE TATLER, SKETCH and PUNCH, etc., etc. Each hotel is provided with handsome real morocco covers bearing the name of the hotel and the title of the respective papers embossed in gold. These covers incorporate a special locking device which prevents removal of the magazine by an unauthorised person. Our service department, on their weekly visit to the hotels, are responsible for the insertion of the new paper and the removal of the old one. On examination of our specimen cover you will see that in or near the centre of the paper we have created a four-page advertising inset, and our offer to you is page of this inset in . [Presumably the name of the paper.] Your advertisement can be printed in one, two, three or four colours at no extra cost to you; we bear all printing charges, you supply blocks and lay-out only. If you will refer again to the rate card, you will see that the seventy-five hotels have a total weekly accommodation of over 12,000, giving an annual total figure of 600,000. Assuming that only 25 per cent. of these residents are attracted by your advertisement, you will still secure a Class A circulation of 150,000. The cost of a page, type area is £3 weekly and the contract is for twelve months exhibition. A brief consideration of these figures will, we are sure, confirm that our proposition is first-class economic advertising for which we claim there is no equal. All advertisers using this medium receive from us weekly a certificate confirming that the current issue of the publication, incorporating the advertising inset, has been delivered and is on exhibition at the seventy-five hotels.

The defendants admit that document A, which has been proved in this action, is an example of a jacket on a journal and inset as used by the defendants prior to the issue of the writ. It is a red morocco cover, headed THE BYSTANDER, with the name "Hotel Splendide" below, and again below that the words "Not to be taken away." Inside the cover is a coloured advertisement, and there is a leaf also in cardboard inside containing two more advertisements. Then inside the cover of these two leaves is a copy of THE BYSTANDER. If one turns over the leaves of THE BYSTANDER, one finds, first of all, the advertisements, then pictures and literary matter, and, after an article upon films of the day, one comes suddenly upon "Supplement, Page 1," the supplement being upon exactly the same-sized sheets, and, as far as I can see, of exactly the same paper. There is nothing to show any difference between them. In fact, it is described as "Supplement, Page 1." The supplement has four pages of advertisements, which are fastened in, together with the rest of the copy, by a metal bar. I do not know how it is undone, but the bar appears firmly to fix this supplement together with the rest of the newspaper, THE BYSTANDER, inside the morocco cover. The pages are headed: "Supplement, Page 1," "Supplement, Page 2," "Supplement, Page 3," "Supplement, Page 4"; but there is at the bottom of each page of this supplement the words:

> This supplement is issued and published by Publicity Services (London), Ltd., 45, High Holborn, London, W.C.1.

A That is in very small print at the extreme bottom of each page in blue ink. One can see this only if one looks at it, but, reading it, at first sight I did not observe the words at the bottom, and, if I had, I am not certain how far I should have taken any notice of them. I can only form my own opinion of this from looking at it. That is what the defendants were doing when the writ was issued. I should have mentioned B that the four pages are four pages of advertisements, quite handsome advertisements, three of them being in colours and the fourth set out with different-sized print and conspicuously. There is nothing in the least objectionable about them as advertisements that I can see. In fact, they look at first sight, I should have thought, as if they were a continuation C of the advertisements in THE BYSTANDER.

The writ was issued on Apr. 13, 1937. The indorsement of the writ as originally issued is as follows:

> The plaintiffs claim: (i) an injunction to restrain the defendants, their servants and agents from passing off altered copies of the plaintiffs' periodicals as and for D new and unaltered copies issued by the plaintiffs and from doing any act such as would lead to any passing off as aforesaid, (ii) an inquiry as to damages and payment. . . .

They also claimed delivery up or destruction on oath of all copies, and costs. The statement of claim was delivered on June 3, 1937, and cl. 1 E of the claiming part is in exactly the same terms as is cl. 1 of the writ. Clause 2 is something which was not in the original writ. It is:

> An injunction to restrain the defendants, their servants and agents from inserting or binding into the plaintiffs' publications matter which has not been authorised by the plaintiffs and publicly distributing such altered publications for the purposes of trade.

F Clause 3 is "An inquiry as to damages and payment"; cl. 4 is delivery up or destruction on oath, as in the writ; and cl. 5 is costs. That was the original statement of claim. The defence was delivered on July 13, 1937. Para. 7 of the defence is as follows:

> The defendants admit that they have supplied to certain hotels stiff jackets G intended to hold certain journals, including THE TATLER, THE SKETCH and THE BYSTANDER, in para. 1 of the statement of claim mentioned, to the inside of which are affixed advertisements published by the defendants and that they have inserted into such jackets copies of the current journals for which such cases are respectively adapted and a further sheet of advertisements (hereinafter referred to as an "inset") published by the defendants and so described. Each such journal with the inset placed between pages near the centre thereof has been fastened by the H defendants into the jacket by means of a locking bar. An example of a jacket with a journal and inset as used by the defendants prior to the issue of the writ in this action may be inspected at the office of the defendants' solicitors marked "A." [That is the document A. to which I have referred.] Immediately upon receipt of the writ herein (which was the first intimation of any complaint by the plaintiffs) the defendants by the affidavit of J. W. Streeton filed herein Apr. 16, 1937, informed the plaintiffs of their intention to make certain alterations in their practice and proceeded to alter the wording on their insets in a manner shown on the example which may be inspected as aforesaid marked "B."

B. is substantially the same as A. until we come to the so-called inset. In the supplement, on each side of the word "Supplement" and at the top of the page, there has been printed in blue ink, in considerably larger type than the original blue ink at the bottom of the page in A.:

> This inset is published and added by Publicity Services (London), Ltd., and is not a part of the original publication.

Otherwise I do not think that there is any difference as between A. and B.

Para. 11 of the defence is as follows:

> Upon the hearing of a motion herein before Simonds, J. (on which no order was made save that the costs were reserved), the defendants by their counsel stated (as was and has always been the fact) that the defendants were willing to make any reasonable alteration in the appearance of their jackets and insets so as to prevent any possibility of confusion and by letters from the defendants' solicitors to the plaintiffs' solicitors dated respectively Apr. 20 and May 7, 1937, the defendants invited suggestions from the plaintiffs; but the only reply from the plaintiffs' solicitors has been a letter dated June 3, 1937, to which the defendants will refer for its terms. The defendants hereby offer an undertaking not to put into any journals of the plaintiffs any inset unless distinguished in the manner shown in the example "C" which may be inspected as aforesaid or some manner not less effective and not to use the words "sole concessionaires" and to pay such costs (if any) as to the court on motion for judgment may seem fit.

On the red cover of C., instead of only the words The Bystander on the outside, these words appear in gilt lettering: "Extracts from The Bystander with added matter," below that "Grosvenor Hotel," and below that the words "Not to be taken away." On opening it, one finds that the outside page of The Bystander has been taken away and that a blank page has been added, on which is printed at the head: "Extracts from The Bystander with added matter." When one comes to the inset, the inset has at its head:

> This inset is published and added by, and is the property of, Publicity Services (London), Ltd., and is not a part of the original publication.

The words at the bottom in blue ink about it being printed and published by so-and-so have gone. The words "This inset is published and added," and so on, occur at the bottom of each page, but the supplement remains still "Supplement, Page 1," "Supplement, Page 2," "Supplement, Page 3," "Supplement, Page 4," That is the substantial difference in C.

After the case had been opened before me, counsel for the plaintiffs stated that the only question to be determined in the action was whether the defendants were justified in using document A. as they used it, and he asked for and obtained leave to amend his statement of claim by adding, at the end of cl. 2 of the claiming part, the words:

> in such a way as to hold out the plaintiffs as responsible for such added matter.

The defendants' counsel thereupon asked for and obtained leave to amend their defence by striking out from para. 11 the words: "unless distinguished in the manner shown in the example 'C.' which may be inspected as aforesaid or some manner not less effective," and substituting the words:

> without putting in reasonably prominent letters at the head of each page the words "This inset forms no part of the journal as originally published and is published and added by and is the property of Publicity Services (London), Ltd., who have no connection with the publishers of the journal, Illustrated News-
> A papers," or words substantially to the same effect.

That is the way in which the pleadings now stand.

The result of an examination of document A., to which I have referred, and of the evidence which I have heard, is that I have come to the conclusion that the acts of the defendants as admitted in para. 7 of the B defence are calculated (i) to lead the trade and the public to believe that the four-page inset fastened into the copy of The Bystander and included in document A. is part of The Bystander as originally published by the plaintiffs, (ii) to cause damage to the plaintiffs, and (iii) to expose the plaintiffs to the risk of litigation. On the first point, I attach import- C ance to the fact that each page of the inset is headed with the word "Supplement," which seems to me to be necessarily a suggestion that it is a supplement to the original paper, and not something quite separate and distinct, and also to the fact that the inset is bound up with the original publication, and printed on paper of the same quality, as far D as I can judge, and of the same size, as the paper used in the original publication. I do not think that the words "This supplement is issued and published by Publicity Services (London), Ltd., 45, High Holborn, London, W.C.1.", which are printed in very small print at the bottom of each page of the inset, are sufficient to counteract the effect of the other E facts which I have mentioned, pointing in the other direction. On the second point of fact, I find on the evidence that, as a result of the defendants' acts, the plaintiffs' publication will be a less attractive publication to the reading public, and will also be a less attractive medium for advertisers, and that it is likely that advertisers will be offended, and F will go to the defendants for their advertisements, instead of to the plaintiffs. Those are results which I think may flow from what the defendants have done. On the third point, I find on the evidence that the plaintiffs may well be thought to be responsible for the inset, and that they run a reasonable risk of being exposed to litigation—not G successful litigation, but litigation which may none the less be very annoying, and may possibly cause them considerable expense.

The plaintiffs in the claim which they have made rely on the law of passing off as expounded by Lord Parker of Waddington in *Spalding & Brothers* v. *A. W. Gamage, Ltd.* (1), and as expounded by the Court of H Appeal in *Samuelson* v. *Producers Distributing Co., Ltd.* (2). The plaintiffs say that it appears from these cases that a right of action by A. against B. arises if B. makes a misrepresentation as to A.'s goods for trading purposes and such misrepresentation gives rise to a probability of damage to A. Mr. Bray, in his very able argument for the defendants in this case, contended that the authorities did not justify the statement of the law contended for by the plaintiffs. His contention, as I understand it, was that a right of action for passing off does not arise unless some third party is deceived. He says that the statement of the law by Lord Halsbury in *Reddaway* v. *Banham* (3), at p. 204, which was adopted by Lord Parker of Waddington in *Spalding & Brothers* v. *Gamage (A. W.), Ltd.* (1), to which I have referred, must be qualified, not only by limiting it to representations for trading purposes, but also by limiting it to cases where some person will be deceived. He says that in the present case there is no person who will deal with the defendants in the mistaken view that he is dealing with the plaintiffs, and that one of the essential elements of a passing off action is wanting in this case.

I think, however, that the plaintiffs' right of action depends upon the injury caused to their property (that is, their goodwill, in this case, in their advertising media) by the defendants' misrepresentation. I think that that is sufficient for the purposes of this action to hold, as I do hold, that a person has no right to represent his goods as the goods of another, and that, if the first person does this for trading purposes, and damage to the other person is likely to result therefrom, the other person has the right to stop the first person from doing it. I find in this case that the defendants by their acts prior to the issue of the writ represented—and here I do not suggest that, when they represented, they did any deliberate and wrongful act knowing it to be wrong; but their acts amounted to a misrepresentation—for trading purposes their advertising media (that is to say, their copies of the plaintiffs' publications, together with the defendants' insets) as being the plaintiffs' original publications, and that damage to the plaintiffs was likely to result from such misrepresentation, and the plaintiffs were, in my judgment, entitled, at the time of the issue of the writ, to an injunction in the form claimed by cl. 1 of the claiming part of the writ—namely, an injunction restraining the defendants:

> from representing for trading purposes altered copies of the plaintiffs' publications as and for unaltered copies issued by the plaintiffs and from doing any acts such as would lead to any representation as aforesaid.

I do not think that the plaintiffs were in any event entitled to an injunction in the form originally claimed in cl. 2 of the claiming part of the statement of claim, as this would apply even if the defendants made it perfectly clear that the insets were not part of the plaintiffs' publications and that the plaintiffs were not in any way responsible for them. The plaintiffs at the opening of their case claimed that they were entitled to an injunction in the form claimed in cl. 2 as amended, relying on the decision in *Walter* v. *Ashton* (4). I understand, however, that the plaintiffs are now satisfied that an injunction in the form claimed in cl. 1, with the alterations which I have mentioned, gives them all the protection that they require, so that it is not necessary for me to decide whether they are entitled to an injunction in the form claimed in cl. 2 as amended. Finding, as I do, that the defendants represented for trading purposes their advertising media as the plaintiffs' advertising media, and that such representation injured, or was likely to injure, the plaintiffs' goodwill, I hold that the plaintiffs became entitled to stop such representations, and I think that the plaintiffs are entitled to an injunction in the form which I have mentioned, with the modifications I have stated.

It is suggested now that that was the position at the date of the issue of the writ, and it is contended on behalf of the defendants that what the defendants have done subsequently disentitled the plaintiffs to any injunction, because the defendants have in effect offered to give the plaintiffs all that they require. I think that, if they had done that, the position might be very different. I think the position is correctly stated in the Annual Practice, 1938, at p. 933:

> A plaintiff is entitled to apply for an injunction and to have his costs as soon as his legal right is invaded, although unintentionally; and he is under no obligation to give the defendant any notice before commencing an action; . . . he is entitled to an injunction, unless before writ there has been an entire abandonment of that which constituted the plaintiff's demand, or unless the defendant has given him everything he did or could ask for by suit.

I think that that represents the position, as a matter of practice at any rate. I do not feel in this case that I can deprive the plaintiffs now of the relief for which they ask, because of the suggestions and offers which the defendants have made, no doubt with the best intentions, as soon as the writ was issued. I do not think that the defendants have ever offered the plaintiffs what they were, in my judgment, entitled to; but the question still arises whether, in view of what the defendants offered, I ought actually to grant an injunction to the plaintiffs, whether it is necessary and whether I ought not to endeavour to frame some order which shows precisely what it is that the defendants are entitled to do. I have considered that anxiously, because I am anxious not to prolong litigation or to extend it more than is necessary, but it seems to me that I should not be doing right or acting fairly to the plaintiffs now if I insisted upon limiting their injunction to something which precisely set out what the defendants might do in this particular case. I think that the plaintiffs are entitled to an injunction in general terms, and that it is for the defendants to consider, when they come to do any particular acts, whether they come within those terms or whether they are outside the restriction put upon them by the injunction.

I think, therefore, that I ought, and am bound in the circumstances of this case, to grant an injunction in the modified terms of para. 1 that I have mentioned. As regards para. 2, I take it that the plaintiffs do not now ask for any order, in the circumstances. I shall have to consider that when I come to deal with the question of costs; but I go on to para. 3. I do not know whether the plaintiffs ask for an inquiry as to damages.

Solicitors: *Nicholson, Graham & Jones* (for the plaintiffs); *Wingfields, Halse & Trustram* (for the defendants).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

ELDORADO ICE CREAM CO., LTD. *v.* CLARK.
ELDORADO ICE CREAM CO., LTD. *v.* KNIGHTON.
ELDORADO ICE CREAM CO., LTD. *v.* KEATING.

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 20, 1938.**]

Factories and Shops—Shops—Occupiers of warehouse—Whether warehouse a "shop" for retail trade or business—Whether warehouse a "place" for retail trade—Whether box-tricycle a "place" for retail sale of ice-cream—Shops (Sunday Trading Restriction) Act, 1936 (*c.* 53), *ss.* 11, 12, 13.

The appellants were occupiers of a warehouse for the storage of ice cream, from which supplies were given daily to a shop assistant in their employment, to be sold by him by retail to members of the public from a movable barrow which in the course of his employment he pushed along a route specified by the appellants. He visited the warehouse only for the purpose of filling the barrow in the morning and accounting to the appellants in the evening. The appellants were charged as occupiers of a "shop" with various contraventions of the Shops (Sunday Trading Restriction) Act, 1936, ss. 11, 12, relating to the employment of assistants on Sundays and the provision of holidays as required by the Act. They were also charged with similar offences in relation to the employment of two persons who pedalled box-tricycles on the public road and stopped from time to time to sell ice cream from the tricycles by retail to passers-by. The justices convicted in each case, holding (i) that the said warehouse was a "place where retail trade or business was carried on as if that place were a shop," within the meaning of sect. 13 of the Act of 1936, and (ii) that each of the said box-tricycles was likewise a "place" within the meaning of sect. 13 :—

Held : (i) as the warehouse was not open for the service of customers within sect. 11, and was not a "place" within sect. 13, of the Act of 1936, because no retail trade or business was carried on at it, the justices were wrong in holding that the warehouse came within the definition of a "shop" in sects. 11, 13 of the Act.

(ii) a "place" within the meaning of sect. 13 must be either a shop or something akin to a shop, and a box-tricycle clearly was not such a place.

[**EDITORIAL NOTE.** This case turns upon the construction of the words "the place for retail trade" as used in the Shops (Sunday Trading Restriction) Act, 1936, s. 13. In the context in which the words are here used, it is held that the words denote a definite fixed locality, at which retail trade is carried on, and that they do not apply to a particular spot at which a retail transaction may be carried out from a box-tricycle at one particular moment of time. The warehouse, it is pointed out, is a place "from" which, and not "at" which, the retail trade is carried on.

As to Sunday Trading, see HALSBURY, Hailsham Edn., Vol. 14, p. 693, para. 1314 ; and for Cases, see DIGEST, Vol. 24, pp. 930-934, Nos. 208-227.]

Appeals by way of case stated against decisions of justices, sitting respectively at Scunthorpe in the county of Lincoln and at Marlborough in the county of Wiltshire, convicting the appellants of offences under the Shops (Sunday Trading Restriction) Act, 1936, ss. 11, 12, 13. The facts and the arguments are set out in the judgment of Lord Hewart, L.C.J.

Robert Ives for the appellants.

R. G. S. Bankes for the respondent Clark.

Vernon R. M. Gattie for the respondents Knighton and Keating.

Lord Hewart, L.C.J.: To deal shortly with these cases in their order, the case of *Eldorado Ice Cream Co., Ltd.* v. *Clark* is a case stated by justices of Lindsey, in the county of Lincoln, and it arises out of a series of three informations preferred by the respondent against the appellants under the Shops (Sunday Trading Restriction) Act, 1936. The informations charge in various ways certain failures of statutory duty which depend upon a contention that the appellants, at the material time, were the occupiers of a certain shop within the meaning of the statute. The shop was in fact described in two of the three informations as a warehouse. The justices, having heard the evidence, came to the conclusion that the three offences alleged had been proved, and convicted the appellants. The question asked is whether, in so doing, the justices came to a correct determination in point of law.

The material facts which were proved or admitted were that the appellants were the occupiers of a warehouse situate at the back of certain premises in Scunthorpe, and it is said in the case that the appellants carried on the business of selling ice cream, and occupied the warehouse for the storage of ice cream, from which supplies were daily given to a man named Fussey to be sold by him from a movable barrow. The case further finds that he was employed to sell the ice cream by retail to members of the public from the movable barrow, which in the course of his employment he pushed along a route specified by the appellants in and around the borough. He visited the warehouse only for the purpose of filling the barrow in the morning and accounting to his employers in the evening. Then there are findings as to the number of hours during which he was employed on Sundays, and findings about his holidays. In those circumstances, it was contended on the part of the appellants that Fussey was not on the days named employed about the business of a shop, because the warehouse was not open for the serving of customers, nor was he employed about the business of a place within sect. 13, because retail trade or business was not carried on at the warehouse. The contrary was contended by the respondent, and the way in which the respondent put his main contention is interesting. It was in these terms:

> That the said warehouse was a place within the meaning of sect. 13 of the said Act inasmuch as retail trade was carried on therefrom.

It is not suggested that retail trade was carried on thereat. The sections of this statute seem to me to be reasonably easy to construe. The Shops (Sunday Trading Restriction) Act, 1936, s. 11 (1), provides:

> Save as is otherwise hereinafter provided, no person shall be employed on Sunday about the business of a shop which is open for the serving of customers on that day unless [certain requirements are complied with].

It seems to me that those words "a shop which is open for the serving of customers" make a kind of compound substantive. The words might be joined to each other by a hyphen, and it is essential that the person employed shall be employed about the business of a place of that nature, a shop which is open for the serving of customers. The provisions of sect. 12 are to some extent extended by sect. 13, and it is upon sect. 13 that the respondent relies. Sect. 13 provides as follows:

> Subject as hereinafter provided, the provisions of this Act shall extend to any place where any retail trade or business is carried on as if that place were a shop, and as if in relation to any such place the person by whom the retail trade or business is carried on were the occupier of a shop.

There follow certain provisions which seem to throw light upon the meaning of the section. For example, proviso (*b*), which says:

> The provisions of sect. 11 of this Act shall, in relation to any place not being a shop, apply only to persons wholly or mainly employed in connection with the retail trade or business carried on thereat.

The word used is not "therefrom." Then again, proviso (*c*) says:

> The provisions of sect. 1 of this Act shall, as applied by this section, have effect as if there were included in the First Schedule to this Act the sale by fishermen of freshly-caught fish (including shell-fish), and the sale at a farm, small holding, allotment or similar place, of produce produced thereon.

The contention in the first of this group of cases was that, on the true construction of sect. 11 and sect. 13 of the Act of 1936, these premises, which are repeatedly described as a "warehouse," nevertheless fulfil the definition of a "shop" in sect. 11, as extended by sect. 13. In our opinion, that contention was wrong, and the contention of the appellants was right, that the employee there referred to was not employed about the business of a shop, inasmuch as the warehouse was not open for the serving of customers, nor was that warehouse within the meaning of the word "place" in sect. 13, because retail trade or business was not carried on at the warehouse. The true function of that warehouse is, I think, made plain by the facts which are found. It was in the nature of a depot, a reservoir, from which the commodity that was to be sold was taken in bulk and then sold in retail portions at various points in the streets. A retail trade was not carried on at the warehouse.

The contrast between the two things is very well exhibited by para. 5 (iii) of the case, where it was found:

> The appellants carried on the business of selling ice cream and occupied the said warehouse for the storage of ice cream from which supplies were daily given to the said Fussey to be sold by him from a movable barrow.

The sales were at the movable barrow, and the warehouse was merely the store, and there is nothing in these exceptions which brings a store or a warehouse within the provisions of sect. 11. In our opinion, therefore, in that case the appeal ought to be allowed and the convictions quashed.

The second case, except in comparatively immaterial particulars, is much the same. It is the case of *Eldorado Ice Cream Co., Ltd.* v. *Knighton*, and that case stated arises from three informations preferred by the respondent, under the statute already named, against the appellants for that on certain days they failed to produce to the respondent a document which they were required to produce pursuant to the Factory and Workshop Act, 1901, s. 119—namely, a record, as required by the Shops (Sunday Trading Restriction) Act, 1936, ss. 12, 13, of certain names, hours, and days of the week. The justices convicted the appellants and fined them, and here also the question is whether, in so doing, they came to a correct determination in point of law. Although in the forefront of those informations was the Factory and Workshop Act, 1901, s. 119, it is perfectly obvious that the matter turned upon the Shops (Sunday Trading Restriction) Act, 1936, ss. 12, 13, because, if that which was being done did not come within the provisions of those sections, the records which the appellants were said to have failed to produce were not the records which they were under any obligation to keep or produce. Here the facts were that the appellants employed certain men on Sundays to sell ice cream by retail in the streets from box-tricycles. A certain man was employed by the appellants as manager of a warehouse occupied by the appellants for the purpose of the storage of their ice cream and the box-tricycles, and it was contended that, in those circumstances, the appellants were occupying a shop within the meaning of the Act of 1936.

The contention of the respondent is slightly amusing. He contended :

> That, bearing in mind the extension of the provisions of the said Shops (Sunday Trading Restriction) Act, 1936, respecting shops to "any place where any retail trade or business is carried on" and that the business of the appellants is carried on by virtue of the said Act, such business must, of physical necessity, be carried on at some place or places, which place or places must be such as the said Act extends to.

If that contention were right, the legislature has done something superfluous in enacting a considerable part of sect. 13, because the proposition is that, as retail business must be carried on in some place, any place which is selected by the complainant, the informer, is a place where retail business is carried on. Having the courage of that view, the persons responsible for the information omitted to specify any place at all. But the argument was, as I understand it, that, although the appellants contended that they were not occupiers of a shop, or a place akin to a shop, within the meaning of this Act, nevertheless the true view was that they were, and that that shop was to be found either in the warehouse which was used for storage or somewhere, quite vague, elsewhere.

I have read para. 7 (*c*) of the contentions of the respondent, and that follows his contention in (*b*) :

> that, having regard to the particular offence charged, it was not incumbent upon the prosecution to specify the particular place or places within the borough of Swindon where the retail trade or business of the appellants was carried on.

In fact, it was clear upon the facts that it was not possible to specify a place within the meaning of the section. In our opinion, the contentions of the respondent there were wrong, but they were adopted by the justices, and I think, therefore, that that series of convictions must also be quashed and the appeal allowed.

Finally, we come to the third case, where a more ingenious and subtle argument has been advanced by Mr. Vernon Gattie. That is the case of *Eldorado Ice Cream Co., Ltd.* v. *Keating*. Here the case is stated by justices for the county of Wiltshire, and it arises out of four informations preferred by the respondent against the appellants under the Shops (Sunday Trading Restriction) Act, 1936, alleging a series of contraventions of the provisions of that statute. Here, also, the justices convicted the appellants, and the question again is whether they came to a correct determination according to law. Here, so far as the method is concerned, it was extremely like the method in the last preceding case. The appellants employed two persons during certain hours on Sundays to sell by retail from box-tricycles. The method is described in para. 5 (v) of the case:

> Each of the said persons pedalled a box-tricycle upon the public thoroughfares in and around Marlborough and stopped from time to time in the neighbouring villages and sold ice cream therefrom by retail to passers-by.

Here the contention was boldly made, not indeed that any warehouse was a shop, nor that the place where, at a given moment, the box-tricycle was to be found was a shop, but that each of the two box-tricycles themselves, from which sales were made, was a place where retail trade or business was carried on within the meaning of sect. 13 of the Act. The contrary contention of the appellants was that neither of the box-tricycles was a place within the meaning of sect. 13, and, in consequence, that the records which they were said to have failed to produce were records which they were under no obligation to make. The argument of the respondent prevailed, and Mr. Vernon Gattie has argued with great ingenuity that, on the true construction of sect. 11, as extended by sect. 13, of the statute, the tricycle itself was a "place" within the meaning of the Act. Not, it is to be observed, the spot of land upon which, at any given moment, the tricycle might be standing in order that a sale might be carried out, but that the tricycle itself was a place within the meaning of the section.

It seems to me that, when one looks at sect. 11, and, indeed, at the whole scheme for the purposes of this Act—which begins with the provision about the closing of shops and the serving of customers in shops, which sect. 11 contains the words already referred to, that no person shall be employed on Sunday about the business of a shop which is open for the serving of customers on that day unless certain requirements are complied with—I think that it is essential that the place where the employment is carried on must be the place which is either a shop or premises akin to a shop, so as to be a place within the meaning of sect. 13. What does sect. 13 say? It does not say that any retail sale at all, wherever made, shall be within the meaning of the Act; it does not prohibit the transaction of selling: it refers to a "place":

> . . . the provisions of this Act shall extend to any place where any retail trade or business is carried on as if that place were a shop, and as if in relation to any such place the person by whom the retail trade or business is carried on were the occupier of a shop.

To re-write, therefore, sect. 11 as that argument seeks to extend it, one gets some such result as this :

> No person shall be employed on Sunday about the business of a box-tricycle which is open for the serving of customers on that day unless the following requirements are complied with.

When one looks at sect. 13, the place which is referred to is " any place where any retail trade or business is carried on," not any apparatus by means of which, or any place from which, retail trade or business is carried on. So one finds in the proviso to sect. 13, any person employed " in connection with the retail trade or business carried on thereat." All through these sections one finds words which denote locality and position, a definite fixed locality or position, and so one finds in the regulations which are made under the Act—S.R. & O., 1937, reg. 271—that it is required, among other things, that the address of the place shall be stated. What would be the address of the tricycle, if the tricycle be a place ? Part of Mr. Gattie's argument seemed to treat it as if the expressions were synonymous : the box-tricycle is a place and the box-tricycle is at a place The argument here is not that the appellants were the occupiers of the land on which this box-tricycle stood. The argument here was plainly and boldly that the box-tricycle is a place within the meaning of this section. Wherever one looks in these Acts, the word " shop " means places of some sort or other, and the word " place " is akin to it. One must find premises where retail trade or business is carried on, premises which are open for the serving of customers, and, with all due respect to Mr. Gattie's argument, it seems to me fantastic to argue that the box-tricycles were premises or a shop or a place. The box-tricycle was part of a movable and peripatetic apparatus by means of which sales were enabled to be made at every sort of point in streets and roads over a large area—no fixed position, no fixed locality, no identifiable place.

I think, therefore, that here also these justices took a wrong view of the law, and that this appeal ought to be allowed, and these convictions quashed.

BRANSON, J. : I agree, and have nothing to add.

HUMPHREYS, J. : I also agree, and have nothing to add.

Appeals allowed with costs, and convictions quashed.

Solicitors : *Wilfrid Ellis* (for the appellants) ; *Beachcroft, Wakeford May & Co.*, agents for the *Town Clerk*, Scunthorpe (for the respondent, Clark) ; and *Sharpe, Pritchard & Co.*, agents for *W. L. Bown* Trowbridge, Wilts (for the respondents, Knighton & Keating).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

TAYLOR *v.* TOWNEND. SAUNDERS *v.* TOWNEND.

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 19, 1938.**]

Markets and Fairs—Street trading—Public carriage way—Receptacle occupying stationary position thereon—Selling article therefrom without a licence—Receptacle ordinarily moved from place to place in pursuit of trade—London County Council (General Powers) Act, 1927 (c. xxii), *s.* 30.

The appellant was charged with having unlawfully sold a certain article or thing, namely ice cream, from a receptacle occupying a stationary position at a place on a public carriageway, without a licence, in contravention of the London County Council (General Powers) Act, 1927, s. 30. The receptacle was a tricycle carrying a box containing portions of ice cream. The appellant patrolled certain streets several times a day, and at certain times of the day, when children were entering or leaving school, he stayed outside the school so that the children might buy ice cream from him. The appellant contended that no offence had been committed under sect. 30, as the proviso to that section rendered the section inoperative in cases of a receptacle which a person "ordinarily moves from place to place in pursuit of and while conducting his trade." The justices held that the receptacle occupied a stationary position within the meaning of sect. 30, and that an offence had been committed. They dismissed the charge under the Probation of Offenders Act, 1907:—

Held: the appellant's conduct was covered by the proviso to sect. 30 of the Act of 1927, and no offence had been committed.

[**EDITORIAL NOTE.** It is required by statute that street-traders must be licensed, but an exception is made in favour of those who ordinarily move from place to place. It is here held that one who stays for a reasonable time in one spot is protected by the exception so long as his ordinary method of conducting his trade is by moving from place to place. The fact that a person is trading from a barrow or movable receptacle is *prima facie* evidence that the exception applies to him.

As to Street-traders, see HALSBURY, 1st Edn., Vol. 27, Street and Aerial Traffic, p. 288, para. 594; and for Cases, see DIGEST, Vol. 33, pp. 564-568, Nos. 488-539.]

Appeals by way of case stated from a decision of the justices sitting at Kensington. The facts and the arguments are set out in the judgments.

J. W. Morris, K.C., and *Gilbert Woodward* for the appellants.

Harold Murphy, K.C., and *Granville Sharp* for the respondent.

Lord Hewart, L.C.J.: This is a case stated by justices arising out of an information preferred by the respondent, the town clerk of Fulham, against the appellant for that on a certain day in Fulham he unlawfully sold a certain article or thing, namely ice cream, from a receptacle occupying a stationary position. The two cases, this case and the next in the paper, are in all material respects the same. The justices found the charge proved, and convicted under the Probation of Offenders Act. The question for us is whether in so doing they came to a correct determination in point of law.

There is no dispute as to the facts, which are simple and clear. The receptacles referred to were tricycles, each of which carried a box in which portions of ice cream were to be found, and what the persons riding those tricycles and carrying that ice-cream did was to patrol certain streets four or five times a day, and at certain times of the day, when children were going into or coming out of school, to spend a little time near the school, where they could find customers among the children. The justices have come to the conclusion that that course of conduct brings the appellant in each case within this section. They say:

> We were of the opinion that the contentions of the respondent were correct that in the circumstances the remaining of the said box-tricycle in the same place for 20 minutes amounted to its occupying a stationary position within the meaning of sect. 30.

It seems to me that, in expressing their opinion in that way, the justices have gone wrong. They seem to have thought that, in order to come within the mischief of this section, the receptacle must only be stationary, that it must be something which can be said to be occupying a stationary position. That, I think, is a misreading of the section. The section is directed against persons who, without licence, shall sell or expose or offer for sale any article from a barrow, cart, stall or other receptacle occupying a stationary position. Then comes a proviso. And what is the effect of that proviso? I cannot help thinking that it must be to except certain receptacles notwithstanding that at a particular time they do occupy for a time a stationary position. The question is: What is the nature of the thing they are engaged upon? The proviso is in these words:

> Provided that this section shall not apply to any person selling or exposing or offering for sale any article or thing from or upon any barrow cart stall or other receptacle which he ordinarily moves from place to place in pursuit of and while conducting his trade.

If the receptacle is one which the seller ordinarily moves from place to place in pursuit of or while conducting his trade, it seems to me that it matters not that for a reasonable time he remains stationary somewhere. If he did not occupy a stationary position somewhere, this section would not cover him at all. I cannot help thinking that these justices have paid too little, if any, attention to the words:

> which he ordinarily moves from place to place in pursuit of and while conducting his trade.

Effect must be given to every one of those words, and I think that it would be not enough to protect a man who has a receptacle which is sometimes stationary if he merely moves it from place to place on some special occasion or for some extraordinary reason. But, if it is a normal part of his trade that he should remove that receptacle from place to place in pursuit of and while conducting his trade, then I think that he is protected. It seems to me that the justices here have almost wholly ignored the proviso to this section, and I think that, in these circumstances, the justices' conclusion should have been that the offence was not committed. I think, therefore, that the appeal ought to be allowed.

Branson, J.: I agree. It appears to me, from the way in which the justices have stated their opinion, that they have demonstrated that they have paid no attention to the proviso. In order to bring the cases within the section at all, they have got, as Lord Hewart, L.C.J., has pointed out, to find that the vehicle or receptacle occupied a stationary position. If they had not been satisfied of that, then they would have had to dismiss the information upon that ground alone. It was argued before them that, notwithstanding that the vehicle was in a stationary position, the conduct of the appellant was covered by the proviso to the section. It is with that point that they do not purport to deal. If they had found as a fact that he did not ordinarily move from place to place in pursuit of and while conducting his trade, different considerations would have applied, but they have not found that. They have simply ignored the proviso altogether. I agree entirely with what Lord Hewart, L.C.J., has said.

Humphreys, J.: I have myself found considerable difficulty in coming to the conclusion that the proviso to this section was intended to authorise on occasions that which it prohibits in the first part of the section. The first half, as I understand it, is for the purpose of preventing the trading from barrows, carts, and such receptacles, by a stationary trader. In the proviso, to which I agree that the justices appear to have paid no attention here at all, something is allowed. It may be (and I gather that the other members of the court think that this is what is allowed) that a person may at times trade from a stationary position in a street, if his ordinary method of trading is to trade from a movable and moved receptacle. It may be that that is so. I do not differ from the judgments which have been pronounced. I say merely that I have considerable difficulty, if that is so, in making sense of the section.

Appeals allowed with costs, and order of justices quashed.

Solicitors: *Joynson-Hicks & Co.* (for the appellants); *Wilfred Townend*, Town Clerk, Fulham (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

POLKINGHORN *v.* LAMBETH BOROUGH COUNCIL.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Farwell, J.), **January 20, 21, 1938.]**

Highways—Breach of statutory duty—Street refuge—Duty of local authority to light—Metropolis Management Act, 1855 (*c.* 120), *ss.* 108, 130.

An illuminated bollard at one end of a tram refuge had been damaged in an accident. The defendant council had placed a light upon it, but this light had, for some unexplained reason, gone out. As a result of this, the plaintiff's motor car collided with the bollard, and the plaintiff was injured :—

HELD : the defendant council, having erected the refuge and bollards, were under a continuing duty to keep them adequately lighted. They were, therefore, liable to the plaintiff in respect of the injury he had sustained.

[**EDITORIAL NOTE.** In the somewhat similar case of *Great Central Ry. Co.* v. *Hewlett* (1), the lighting of the obstruction was the subject of certain War-time regulations. The post in that case was not by its construction intended to be illuminated, and its erection was sanctioned by an Act of Parliament. In the present case, the bollard was by its construction intended to be illuminated, and it is held that there is a continuing duty when it is dark to keep it lighted, applying the principle laid down in *Lamley* v. *East Retford Corpn.* (2), that a local authority must take all reasonable precautions to ensure the safety of people using the road.

AS TO DUTY TO LIGHT OBSTRUCTIONS, see HALSBURY, Hailsham Edn., Vol. 16, p. 363, para. 485 ; and FOR CASES, see DIGEST, Vol. 26, p. 419, Nos. 1381-1384.]

Cases referred to :

(1) *Great Central Ry. Co.* v. *Hewlett*, [1916] 2 A.C. 511 ; 26 Digest 419, *1383* ; 85 L.J.K.B. 1705 ; 115 L.T. 349 ; *revsg.* S.C., 114 L.T. 713.

(2) *Lamley* v. *East Retford Corpn.* (1891), 55 J.P. 133 ; 26 Digest 390, *1171.*

(3) *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502 ; 26 Digest 392, *1190* ; 120 L.T. 470.

(4) *Brown* v. *Lambeth Borough Council* (1915), 32 T.L.R. 61 ; 26 Digest 515, *2188.*

APPEAL from a decision of His Honour JUDGE TUDOR REES at Lambeth County Court, dated June 18, 1937. The facts are fully set out in the judgments.

W. E. P. Done and *F. G. Bonnella* for the appellants.

H. Thackwell Lewis for the respondent.

Done : Where a sufficient light has been provided, and all precautions are taken to maintain it, and for some unexplained cause the light is found extinguished a few minutes before it would have been out in any event, that is not a sufficient reason for penalising the defendants. They took all reasonable care to provide an efficient light, and there was no reason to suspect that it would go out. No breach of statutory duty is pleaded, only negligence and nuisance ; the respondent cannot now put that point forward. [Counsel referred to *Baldock* v. *Westminster City Council* (3) and *Brown* v. *Lambeth Borough Council* (4).]

Lewis was not called on.

SLESSER, L.J. : This appeal fails. It was a claim made by Mr. Charles Edward Leach, who suffered injury by colliding with what has been called a bollard, which was erected at the end of a refuge for accommodating people who were about to board or disembark from trams in the Clapham Road. It is called on the plan which has been placed before us " a tram-loading island." It is in fact and in substance what is generally called a street refuge. At each end of this tram-loading island there was an illuminated bollard that indicated the end of the tram-loading island. Before the accident in question, the bollard at the end of the tram-loading island which the driver of the motor car was approaching had already been damaged in a previous accident. It had been covered over in part by a tarpaulin, and a light had been placed upon it, which contained an automatic device extinguishing it on the coming of day. That was the position in which it was at the time of the accident. There is really no suggestion, and certainly no finding of the county court judge, that the earlier accident to the bollard had anything to do with the failure of the light, which caused this accident. What happened, according to the county court judge, was this. The plaintiff and his friend were driving along the Clapham Road very early in the morning, at 5.20 a.m. on Mar. 17., before it was light. So that really they were dependent upon artificial illumination. The evidence which was given in the case goes to show that at an earlier time this bollard light was properly burning, but just before the accident it appears that it went out prematurely, before the time when it ought to have gone out according to the automatic extinguisher. A policeman —P.C. Barker—who was called said that he was at the scene of the accident at 5.20 a.m., and that he last saw the lamp at 3 a.m. It was a hurricane-lamp, with red glass, and with an electric bulb inside, hung over the south side of the bollard. Mr. de Gurter, who was in the Clapham Road at 5.20 a.m., waiting for a tram to go to work, said that there was no light on the bollard when the motor car collided with it. That was, as I have already said, shortly after 5 a.m., about 5.20 a.m. There is no explanation at all as to why this lamp failed, but it is a fact that it was out at the time of the collision. It is really not suggested that there was round about the bollard any other light which was reasonably sufficient to indicate the fact that the bollard was obstructing the highway. The judge said in his judgment that the defendants themselves clearly indicated that it was their duty to affix a red light to the artificial work they brought on the highway. Mr. Done, counsel for the local authority here, has not suggested that this was a case where, even though the bollard light was out, there was any other adequate and sufficient light to show the place of the bollard. Nor, indeed, was any case of contributory negligence on the part of the driver of the motor car really maintained, and certainly it was not found. Therefore, the case which the county court judge had to consider was this. It being admitted that the local authority had placed this bollard, which normally would be a dangerous obstruction, on the highway, had they taken reasonable precautions to see that that which would normally be a danger would not be a danger to persons using the highway by reason of the precautions which they took ? Under the Metropolis Management Act, 1855, s. 108, it was made lawful for every vestry and district board —and the metropolitan borough of Lambeth are the inheritors of the powers of those vestries and district boards—from time to time to place erections in the carriage way so as to make crossings less dangerous for foot-passengers, and to put posts, rails and fences and the like. There is no doubt at all that they had ample and sufficient power to erect this island, and to place the bollard at the end of it. Having utilised their statutory right to place this refuge there, and this bollard, they, being clothed with the statutory duty or power to do that act, in the language of LORD WRENBURY, in *Great Central Ry. Co.* v. *Hewlett* (1), must in doing it exercise reasonable care to prevent injury to others. The county court judge has found that they have failed to exercise that reasonable care, because they have failed to keep lighted the lamp, which would have shown a driver on the highway that the bollard was present. In my opinion, the finding of the judge in this case is fatal to the appellants' contention here. The obligation, so long as the bollard is in the street and it is dark, is to keep it lighted, and they have failed so to do. It matters not, therefore, *prima facie*, in the absence of some possible explanation excusing their performance of their obligation to render the bollard safe, that it cannot be explained how the light failed. The obligation to keep the light burning was, in my opinion, for so long as the bollard was a danger by reason of the fact that it was dark, a continuing obligation. In other words, there was as much obligation to keep the light burning at the moment of the accident as there was at any other time during the night.

A number of authorities have been mentioned, but I think that for this purpose I need refer to one only, the case of *Lamley* v. *East Retford Corpn.* (2). There the local authority had erected a post at the entrance to and in the centre of a footpath, to prevent cattle from straying on to the public footpath. It was an erection which they had power under the Public Health Act to make, just as here the Lambeth Borough Council have power under another statute to make the refuge and put up the bollards. The local authority in the *Retford* case (2) were in the habit of placing a lamp at night by the side of this post. The plaintiff was passing along the footpath at night when the lamp was out, or not lighted, and in consequence of the darkness he came against the post, suffered injuries, and brought his action. LORD ESHER, M.R., makes this observation, at p. 133 :

> . . . the corporation had undertaken to light the town. . . . They must light the town reasonably and sufficiently. The jury by their verdict have found that they have not done so. The corporation have also power to put up posts, and there is no doubt that they had a perfect right to put up the one in question here, and to put a lamp near it. But if they put posts in this way, they must put them up in such a way as not to be dangerous obstructions. The lamp and the post should be put up near to each other, and the lamp should be lighted and kept lighted at nights. That has not been done, and the plaintiff has in consequence been injured.

Applying that language to the present case, I would say here similarly that the corporation had power to put up the refuge and put up the bollards at the end of the refuge. They had power to make that safe by well and sufficiently lighting the bollards: but, if they do so, the lights must be lighted, and must be kept lighted.

For these reasons, I am of opinion that the county court judge was A
right in coming to the conclusion that the corporation in the circumstances had failed to satisfy him that they had taken reasonable precautions to avoid the dangers which would have been otherwise caused by their placing this bollard in the highway at the time of the accident. Consequently, I am of opinion that this appeal must be dismissed. B

SCOTT, L.J.: I agree, and would add only this to the judgment of SLESSER, L.J. Under the Metropolis Management Act, 1855, s. 130, a statutory duty is laid upon a local body in the position of the Lambeth Borough Council to-day to light, and to maintain the lighting. The C
wording of that section is this:

> Every vestry and district board shall cause the several streets within their parish or district to be well and sufficently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as such vestry or board may think fit, necessary, or D
> proper. . . .

Under that section, it was clearly the duty of the Lambeth Council to maintain a light, which would prevent one of the obstructions, properly erected under sect. 108 for the purpose of assisting foot-passengers, from being a danger to motor traffic in the road. E

A glance at the plan shows that this island, put there for the convenience of passengers waiting for or descending from the trams, was about 30 yds. long, and was in a position in the road 18 ft. from the near side of the road from the point of view of traffic approaching from the south-west. At each end of this loading-island, an F
illuminated bollard was arranged for, as part of the permanent outfit of the island. Provision had been made for maintaining lights on these two bollards permanently through the hours of darkness. A few days before the accident in question, the southern bollard had been broken by a previous accident. The bollard being in a position where on-coming G
traffic would find it absolutely in their way, they avoided it by keeping out of the way of the island. But it had in fact been broken. That being the position, it was the duty of the defendant council, under their statutory obligations, to see that the bollard was efficiently lighted. In considering what their duty was, it is important to bear in mind that H
this bollard, if unlighted, and the island itself, with its kerb raised above the level of the surface of the road, were extreme and imminent dangers of the gravest possible kind to on-coming motor traffic, just because they were in the middle of the road.

In those circumstances, as SLESSER, L.J., has pointed out, the facts were these. A temporary light had been fitted there, the source of illumination being the electric current used in the lighting system of the road, a temporary connection having been made with that current. Had the temporary connection been effectively made, presumably the light in the temporary lantern would have continued to work concurrently with the working of the street illumination generally, and would have remained alight until dawn on that day, at 5.35 a.m. In fact it went out before this unfortunate plaintiff came into the proximity of the island. Seeing nothing ahead, though he was going at a very reasonable pace, he drove straight into the bollard.

In those circumstances, my view is that the legal position is a very simple one. It is that, whether one regards the case from the point of view of statutory duty or from the point of view of common law negligence, in either case the failure to maintain the light is all it is necessary for the plaintiff to prove, in order to establish his right to damages, unless after that evidence the defendant council gave affirmative evidence to displace the onus which was put upon them to disprove liability for the accident. In the absence of evidence satisfying the judge that they had been guilty of no fault, and that the cause of the light being extinguished was some cause for which they were not responsible in law, the liability for the accident remained upon them. In the judge s judgment there is no indication whatever of any such evidence having been tendered. We were told by Mr. Done, on behalf of the council, that some evidence of the kind had been attempted, of which the judge had taken no note. From the absence of any reference to that evidence by the judge, we can conclude only that it failed to satisfy him that the defendant council had any explanation consistent with their duties to the plaintiff of the light having failed and gone out. In the circumstances, in my view, the case is a very simple one, and is, *prima facie*, a case of negligence and breach of statutory duty, no answer being attempted, or successfully established, by the defendants to displace that onus. For these reasons, in my opinion, the appeal must be dismissed with costs.

FARWELL, J.: I agree, and I have very few words to add. Having regard to the way in which this matter came before the county court judge, and to the way in which it was dealt with by him, I prefer to deal with it as a case of negligence rather than as a case of breach of any statutory duty. By that I do not in the least mean that I differ in any way from the judgment of SLESSER, L.J., but, having regard to the way in which the county court judge dealt with it, I prefer to deal with it as a matter of negligence. At and immediately before the critical moment of the accident, this bollard was unlighted, and it was the fact that it was unlighted that caused the accident. That has been found by the county court judge as a fact, and there is no suggestion of any contributory negligence on the part of the plaintiff. The failure to light the bollard was, in my opinion, quite plainly a negligent act on the part of the defendants. The bollard represented an obstruction to the highway, and to leave it unlighted in the dark was common law negligence. The only explanation of the failure to keep the bollard lighted put forward by the defendants was that it was lighted at some other time. That appears to me to be wholly irrelevant. It may have been alight at some other time, and the fact that it was not lighted at the particular time may not be capable of explanation, but it is in no way sufficient to discharge the onus which, in my judgment, rests upon the defendants, to show that they were not negligent in having failed to keep the bollard lighted, to say that it was lighted at some other time of the night. For these reasons, in my judgment, the county court judge was right in the conclusion to which he came, and this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *O. L. Roberts*, Town Clerk of Lambeth (for the appellants); *Francis Miller & Steele* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

R. *v.* MINISTER OF HEALTH, *Ex parte* COMMITTEE OF VISITORS OF THE GLAMORGAN COUNTY MENTAL HOSPITAL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 13, 1938.**]

Crown Practice—Certiorari—Dispute to be determined by Minister of Health—Decision to be final—Whether subject to certiorari—Asylums Officers' Superannuation Act, 1909 (c. 48), *s.* 15.

W. commenced his employment as a shoemaker in a county mental hospital in 1915 during the War. His employment was at first considered temporary, but, in fact, it was continued until 1934. He was never considered by the committee as a permanent employee, and they at all times refused to accept from him subscriptions in respect of the superannuation allowance. After the termination of his employment, his application for a superannuation allowance was refused by the committee, but granted by the Minister on appeal. The Asylums Officers' Superannuation Act, 1909, s. 15, provides that the decision of the Minister shall be final. The difference between the view taken by the Minister and that taken by the committee was, shortly, whether, upon the proper construction of the Act, an officer who had served less than 20 years could be entitled to an allowance. A rule *nisi* for *certiorari* was granted for the decision of the Minister to be quashed, on the ground that the Minister had acted without jurisdiction:—

HELD: the Minister had not acted without jurisdiction, and, although his decision was in effect the construction of the provisions of the Act of 1909, such decision was final, and not subject to be questioned by the grant of a writ of *certiorari*.

[EDITORIAL NOTE. The decision of the Minister was an important one, affecting the rights of a large number of employees of mental hospitals, and, in many cases, employees from whom, it is understood, the committee concerned have not collected superannuation subscriptions. The only question here is, of course, whether such a decision is final and binding upon all parties, and it is held to be so. The terms of the Asylums Officers' Superannuation Act, 1909, s. 15, make it impossible to question such a decision unless the Minister can be shown to have acted without, or in excess of, his jurisdiction.

As to Exclusion of Certiorari, see HALSBURY, Hailsham Edn., Vol. 9,
A pp. 870, 871, para. 1470; and for Cases, see DIGEST, Vol. 16, pp. 436-444, Nos. 3003-3094.]

Application to make absolute a rule *nisi* for *certiorari* obtained by the Committee of Visitors of the Glamorgan County Mental Hospital directed to the Minister of Health in order to quash a determination
B of the Minister whereby he determined that Thomas Williams was entitled to receive superannuation allowance under the Asylums Officers' Superannuation Act, 1909. Thomas Williams commenced employment as a shoemaker at the mental hospital in 1915 during the War. His employment was at first classed as temporary, but it was continued
C until 1934, a period of just under 20 years, although he never was in fact classed as permanent. The committee contended that, not having served for 20 years, the servant was not entitled to a superannuation allowance, and, in fact, they had at all times refused to receive subscriptions from him, on the ground that he was not on the permanent
D staff. The Minister upon appeal decided that, under sect. 11 of the Act of 1909, officers required to retire at 55 or 60 years of age are entitled to a superannuation allowance, although they have not served the full period of 20 years. The application, however, has been decided upon a preliminary point—namely, that the decision of the Minister is, by
E sect. 15 of the Act, final, and the remedy by *certiorari* is, therefore, not open to the applicant. Sect. 15 provides as follows:

> In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the [Minister of Health], whose decision shall be final.

F

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Valentine Holmes* for the Minister of Health.

G. D. Roberts, K.C., and *Maurice Fitzgerald* for the Committee of Visitors of the Glamorgan County Mental Hospital.

G *Hector Hughes, K.C.*, and *L. H. Shelton* for the employee, Thomas Williams.

The Solicitor-General: It is sufficient, much as assistance would be welcomed on the construction of this difficult Act, that this rule has been obtained on the ground that the Minister had no jurisdiction.
H He is given jurisdiction to decide these rights, and by sect. 15 his decision is to be final. The power of appeal is thus taken away, and the decision of the Minister cannot be called in question on the ground that it is wrong in law.

Roberts, K.C.: The Minister can decide only within the four walls of the Act. The Act by sect. 2 requires 20 years' service, which, it is conceded, is not the case here. The Minister has given him an allowance disregarding the provisions of the statute.

LORD HEWART, L.C.J.: You say "disregarding"; the Minister says "construing."

Roberts, K.C.: I agree. The expression is immaterial, so long as it is borne in mind that the Act, in my submission, requires 20 years' service. A

LORD HEWART, L.C.J.: In my opinion, this rule ought to be discharged. It owes its origin, I think, to a misconception. A rule *nisi* was obtained for the purpose of securing a writ of *certiorari* to be directed to the Minister of Health in order that ultimately there might be quashed B a certain determination of his whereby he determined that one Thomas Williams was entitled to receive from the Committee of Visitors of the Glamorgan County Mental Hospital a superannuation allowance under the Asylums Officers' Superannuation Act, 1909, s. 11, a determination notified in a letter from the Minister to the Visiting Committee of the C Hospital dated June 10, 1937. The ground, and the sole ground, on which the rule was asked for and obtained was that the Minister of Health had no jurisdiction to arrive at the determination under the Asylums Officers' Superannuation Act, 1909, s. 15. It appears, to go no further than the very clear affidavit made by the clerk and solicitor to the D Committee of Visitors of the Hospital, that a dispute arose as to the true position of this man Thomas Williams, who, admittedly, from Mar., 1915, until May, 1934, was employed by the committee at the Hospital as a shoemaker, a capacity in which he had charge of a certain number of patients. The question was whether or not it was true to say, E regard being had to all the circumstances—the nature of his employment, the duties which he had to perform, and the time during which he had been performing them, and also, and not least, the circumstances in which his employment was brought to an end—he fell within the class of persons entitled to superannuation allowance. That was the dispute F with which the Minister of Health concerned himself, as he lawfully might. The words of sect. 15 of the Act of 1909 are:

> In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum . . . such dispute shall be determined by [the Minister], whose decision shall be final.

G

Here *ex concessis* there was a dispute; it was a dispute as to the right to superannuation allowance. The superannuation allowance in question was the superannuation allowance of a former officer or servant of an asylum. That was the dispute which the Minister took into his consideration, and, in my opinion, it is not arguable, those facts being admitted or H proved, that his decision can be otherwise than final.

I express no opinion as to the merits of the particular case, which we have not fully heard, and into which, in my view, it is not proper for us to inquire. Mr. Roberts has no doubt urged, as always, everything that could be urged on behalf of his clients. I will say for myself, having from time to time had to make observations on this kind of enactment, only that, if ever there was a case where it appeared highly satisfactory that the legislature in its wisdom had provided for finality of decision, this appears to me to be a case of that kind.

BRANSON, J.: I agree.

HUMPHREYS, J.: I agree.

Rule discharged.

Solicitors: *The Solicitor, Ministry of Health* (for the Minister of Health); *Torr & Co.*, agents for *D. J. Parry*, Solicitor to Glamorgan County Council, Cardiff (for the Committee of Visitors of the Glamorgan County Mental Hospital); *Booth & Booth*, Manchester (for the employee, Thomas Williams).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re WYLES, FOSTER *v.* WYLES.

[CHANCERY DIVISION (Farwell, J.), **January 12, 1938.**]

Executors—Legacies—Abatement—Interest—Whether interest payable out of legacy subject to abatement before other legacies.

The testator by his will gave W. a legacy of £3,000, and gave C. certain freehold shops and premises and a legacy of £1,000. He then gave a large number of other pecuniary legacies to various persons and institutions, and disposed of his residuary estate, the said W. and C. each receiving a quarter share in the residuary estate. The will contained a proviso that, if the estate was insufficient, the legacies to W. and C. should abate equally, and that all other legacies should be paid in full before any payment was made to W. or C. By a codicil the gift to C. of the freehold property and a quarter share of residue was revoked, and a legacy of £4,000 was substituted therefor. It was decided as a matter of construction that the legacy of £4,000 given to C. by the codicil was subject to the provision in the will that other legacies were to be paid before those given to C. and W. The estate was insufficient to pay all the legacies in full, but sufficient to pay in full all the legacies except those given to C. and W., and there would be a certain amount for C. and W. The question then arose as to whether the legatees other than C. and W. were entitled to receive interest upon their legacies as from one year after the testator's death:—

HELD: the payment of interest was a payment out of residue, made because the estate was increased by the receipt of interest during the delay in distribution, and, if interest was not paid to the pecuniary legatees, such interest would be for the sole benefit of the residuary legatees. This principle was inapplicable as between C. and W. and the pecuniary legatees here, and the latter were not entitled to receive interest on their legacies.

[**EDITORIAL NOTE.** The payment of interest upon legacies is an administration device for preventing the residuary estate from gaining by the delay in distribution. It is assumed that the estate will be producing income or earning interest, and, if interest was not paid upon the legacies, the income from the whole estate would go to increase the residuary estate. In the present case there is, of course, no residuary estate, and the payment of interest upon the legacies could be made only by the further abatement of the legacies given to the nephews.

As to Interest on Legacies, see HALSBURY, Hailsham Edn., Vol. 14, pp. 354-356, paras. 662-666; and for Cases, see DIGEST, Vol. 23, pp. 405-415, Nos. 4754-4873.]

Originating Summons asking for the determination of certain questions, one of which was whether certain legacies which, by the terms of the will and in the events which happened, had to abate in order that other legacies should be paid in full, had also to bear interest on the other legacies, owing to its having been impossible, in the events which happened, to pay those legacies within a year.

The testator made his will on Apr. 15, 1928, and he made a codicil thereto on Mar. 13, 1929. He died on Mar. 15, 1929. By his will he gave a specific legacy and a legacy of £3,000 to his nephew Walter Nelson Wyles. He gave to his nephew Christopher Douglas Wyles a specific gift of certain freehold shops and premises in Faversham in the county of Kent, and a legacy of £1,000. Then he gave £2,000 to the Southwell Diocesan Finance Association, to be invested by the Association:

> and the income thereof from time to time applied for the benefit of the following benefices in the city of Nottingham namely the parish church of St. Stephen and the Church of St. Alban's the Martyr, Sneinton.

Then he gave a large number of pecuniary legacies to various persons and charitable institutions. Finally, he directed that all the pecuniary legacies of £500 and under were to be paid free of all legacy duty. He then gave the whole of his residuary estate upon trust for sale and conversion in the usual way, upon trust to pay the funeral and testamentary expenses, death duties and debts:

> and the pecuniary legacies bequeathed by this my will or any codicil thereto and the legacy duties in respect of any of the said legacies bequeathed free of duty and to stand possessed of the net residue of the said moneys and to hold the same upon the following trusts namely as to one half thereof upon trust for my said nephews Walter Nelson Wyles and Christopher Douglas Wyles in equal shares and as to the remaining one half thereof upon trust for such of the said three children of my sister Laura Lee Smith who shall survive me and the issue of such as shall have pre-deceased me in equal shares *per stirpes*. . . . Provided always and I declare that if the moneys to arise from the sale and conversion hereinbefore directed or otherwise forming part of my residuary estate shall not be sufficient to pay my funeral and testamentary expenses my trust expenses and the whole of the legacies and trust sums hereby bequeathed and the death duties payable in respect of my estate and the legacy duties in respect of such of the legacies and trust sums as are hereinbefore given free of legacy duty then and in such case the pecuniary legacies hereinbefore given to my two nephews Walter Nelson Wyles and Christopher Douglas Wyles (they being otherwise well provided for) shall abate equally and in priority to the other legacies to the intent that all pecuniary legacies and trust sums hereinbefore given in favour of other legatees and all government duties payable under the terms of this my will shall be paid in full before any payment is made in respect of the said pecuniary legacies given to the said Walter and Christopher Wyles.

The testator made a codicil, and by that codicil, having recited that he had given and devised all the five freehold premises to his nephew Christopher Douglas Wyles, he says:

> and I thereby also gave to him a fourth share in my residuary trust moneys now I hereby revoke the said devise and also the gift of the said share of my residuary trust moneys and in lieu thereof I give to my said nephew a legacy of £4,000 in addition to the legacy of £1,000 given to him by my said will and I also give to him

> all my jewellery and personal ornaments with the exception of my gold watch and chain and seal and my sapphire scarf pin.

Then he gave the freehold properties to his other nephew Walter, and to his second cousin Thomas Russell Wyles the sum of £1,000 in addition to the like sum of £1,000 given by his will. There followed a specific A bequest of a picture, and this direction :

> that my trustees shall stand possessed of my residuary trust moneys upon trust as to one equal fourth part or share thereof for my said nephew Walter Nelson Wyles and as to the remaining three equal parts or shares thereof for such of the three children of my sister Laura Lee Smith who shall survive me and the issue of such as shall have predeceased me.

B After varying certain charitable legacies, he confirmed his will in all other respects. It was decided that the clause in the will providing for the abatement of the legacies given to the nephews in priority to those given to other legatees applied both to legacies given by the will and those given by the codicil.

C All the defendants claimed to be beneficially interested in the estate of the testator.

E. Blanshard Stamp for the plaintiff.

J. F. Bowyer for the first two defendants.

Roger Turnbull for the third defendant.

D *P. J. Sykes* for the fourth defendant.

Bowyer : The position is a serious one if the burden is to be placed upon the legacies left to my clients. The testator died in 1929. Interest is not payable in such a case as the present, because the rule as to payment of interest is a rule of equity, and is based upon the principle that, E if the legacy is not paid within a year, the residuary estate benefits. In the present case, there is no residuary estate to benefit, and therefore the reason for the payment of interest does not apply.

Turnbull : The legacies are entitled to priority in respect both of the amount of the legacies and of interest. A legacy carries interest after F the expiration of a year from the death, and that interest forms part of the legacy itself. The legatees have been kept out of their money, and the estate, on the other hand, has been earning interest, and therefore the legatees are entitled to receive the interest. If one legacy is payable in priority to another, then it follows that interest on that legacy has G priority. The particular proviso in the will makes it perfectly plain what the intention of the testator was. On principle, if my client is entitled to priority in respect of the principal sum, she is also entitled to priority in respect of interest.

H FARWELL, J. : The testator in this case died in 1929. Owing to difficulties of administration, it has not been possible to pay the legacies which are given by the will and codicil, and which in the ordinary course, had the estate been sufficient, would have been paid at the end of the executor's year. It is a well-established rule that, where an ordinary pecuniary legacy is given to a legatee, but for any reason the legacy is not paid over to the legatee at the expiration of the executor's year, that legatee is entitled to have interest on the amount of his legacy from the end of the executor's year up to the date of payment. The reason for that rule is quite plain. Where the estate is sufficient to pay the whole of the legacies in full, and there is a residue, it is obviously unjust that the residuary legatees, who are entitled to nothing until the legacies are paid, should have the benefit of the delay in paying the legacies by getting any interest which the money has been earning in the meantime, and therefore it is obviously just that the legatees, when they come to get their legacies, should get the interest on the legacies which the money would have earned for them if the legacies had been paid over to them, and which the residuary legatees are not entitled to at all. But it is quite a mistake, in my judgment, to say that the sums of interest payable in those circumstances to the legatees are legacies given by the testator in any sense of the word at all. They are sums which are given in the course of administration to the legatees because justice requires that, owing to the failure to pay in due time, the legatee should be put in the position in which he would have been, had the legacy been so paid. It is in no sense a bounty of the testator, in the same sense that a gift to a legatee of the amount of the legacy duty payable on the legacy is an additional legacy given by the testator.

In those circumstances, in the ordinary case where there is no residue, and where legacies have to abate equally between them, of course no question of interest can arise, because there is no surplus out of which interest can come. Each legatee gets the amount of his abated legacy as soon as the estate is available for distribution. But in this case it is said that, because the testator has thought fit to throw upon the two nephews the burden of any abatement in respect of the legacies given by the will or codicil, therefore those two nephews must also bear, not only the amount of the legacy, but also interest as from a year after the testator's death. It is quite obvious that in any case the legatees could not be entitled to interest on the nominal amount of their legacies. At the most, they could be entitled to interest on the abated amount only —that is to say, the amount which ultimately proves to be the sum to which they are entitled.

I know of no authority in which this precise question has ever been determined, but it seems to me that, as a matter of principle, it is not right to say that interest which is undoubtedly payable on a legacy as from a year after the testator's death is in any sense a legacy given by the testator, and, if that be true, then there is nothing in the will or in the codicil to throw upon these two nephews the burden of providing, by a further reduction of their legacy, for something which is not a legacy, nor any part of a legacy, given by either the will or the codicil. The payment of interest (which is a matter of administration, and which is a provision to prevent the injustice of the residuary legatees getting something which otherwise they could not get, merely because there has been a delay in distributing the legacies amongst the legatees), it seems to me, has no application at all to a case of this sort, where the burden is thrown upon other legatees, whose legacies have to abate in priority to those more fortunate legatees, who, so far as they can, get their legacies in full, at the expense of these two nephews. In the circumstances, I A propose to make a declaration that the interest on the pecuniary legacies is not part of that which ought to be set against the legacies given to the two nephews.

Solicitors: *Smith & Hudson*, agents for *Eking, Manning, Morris & Foster*, Nottingham (for the plaintiff and all defendants other than B the first two); *G. O. Meech*, agent for *Breeze, Wyles & Raggett*, Epping (for the first two defendants).

Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

C

PRICE *v.* REPRESENTATIVE BODY OF THE CHURCH IN WALES.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **January 13, 14, 24, 1938.**]

D *Ecclesiastical Law—The Church in Wales—Existing interests at passing of Welsh Church Act, 1914—Holder of ecclesiastical office—Annuity—Appointment to new office with special stipend—Rights of holder of office—Welsh Church Act,* 1914 (*c.* 91), *s.* 18 (*e*).

The plaintiff was the rector of Coity at the time of the passing of the Welsh Church Act, 1914, and under sect. 18 (*e*) of that Act he E became entitled to an annuity of £528 13*s.* 6*d.* so long as he should hold an ecclesiastical office in the Church in Wales. In 1933 he became vicar of Penmark, and as the holder of that office he became entitled to receive some £240 per annum under the terms of a certain bequest. In this action he claimed a declaration that he was entitled to receive the annuity of £528 13*s.* 6*d.* without deduction. The defendants F contended that they were entitled to deduct a sum from the annuity equal to the amount of the income of the bequest by virtue of an arrangement which the plaintiff had made with the defendants' secretary at the time of his induction to the office of vicar of Penmark. Alternatively they contended that they were entitled to make the deduction upon the proper construction of the relevant Acts and the rules and regulations of the Governing Body of the Church in Wales:—

G HELD: (i) upon a proper construction of the Welsh Church Act, 1914, apart from any arrangement, the plaintiff was only entitled to receive an annual payment of £528 13*s.* 6*d.* and, therefore, he must submit to a deduction in respect of the income from the bequest.

(ii) the court was, in the circumstances of the case, justified in drawing an inference that the plaintiff, upon his appointment as vicar H of Penmark, had agreed to permit the deduction from the annuity of the amount he received as vicar under the bequest.

Decision of LUXMOORE, J., ([1937] 1 All E.R. 387) *reversed.*

[**EDITORIAL NOTE.** Upon the disestablishment of the Church in Wales, incumbents who had held what might be called a freehold office were entitled to receive an annuity so long as they held an ecclesiastical office in Wales. The annuity, therefore, continued although the annuitant was appointed to a new office. In the present case the annuitant was appointed to an office, the holder of which, through a generous gift by will, had the right to receive some £240 in addition to his stipend. The question at issue was whether the annuitant was entitled to receive this sum in addition to the annuity or whether it should be deducted therefrom.

As TO EXISTING INTERESTS AT DISESTABLISHMENT, see HALSBURY, Hailsham Edn., Vol. 11, p. 583, para. 1029: and FOR THE WELSH CHURCH ACT, 1914, see A
HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 6, p. 1161 *et seq.*]

APPEAL by the defendants from the order of LUXMOORE, J., dated Jan. 18, 1937, and reported in [1937] 1 All E.R. 387, where the facts are fully stated. B

Sir William Jowitt, K.C., W. N. Stable, K.C., and *F. H. L. Errington* for the appellants.

Harold A. H. Christie, K.C., R. Gwyn Rees and *G. Granville Slack* for the respondent.

C

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]: On July 3, 1933, the respondent, Mr. Price, became vicar of Penmark, a Welsh parish in the diocese of Llandaff. Attached to the benefice was a charitable bequest made by one Dr. Neale, who died in 1917. Under this bequest, Mr. Price, as incumbent, became entitled to receive as an D
emolument of the benefice the dividends on a sum of conversion stock amounting to a little more than £243 a year. In this action, he claims that he is entitled to receive from the Representative Body of the Church in Wales an additional emolument in the form of an annuity of £528 13*s.* 6*d.*, and that he will continue to be entitled to this annuity so E
long as he holds an ecclesiastical office in the Church in Wales. Under the commutation provisions contained in the Welsh Church Acts hereinafter referred to, this annuity of £528 13*s.* 6*d.* represents the yearly income received by Mr. Price as rector of another Welsh Parish—namely, Coity—an office which he held on Sept. 18, 1914, the date of the passing F
of the Welsh Church Act, 1914, and continued to hold down to the day before that on which he became vicar of Penmark. Of that income, £520 was derived from tithe rentcharge which had become attached to the benefice of Coity prior to 1662, and was in consequence not a "private benefaction" within the meaning of the Welsh Church Act, 1914. The G
remaining £8 13*s.* 6*d.* represented income of the proceeds of redemption of similar tithe rentcharge. Mr. Price claims that, notwithstanding that he no longer holds the benefice of Coity, he is entitled to receive payment of the annuity by virtue of the provisions of the Welsh Church Acts. To this claim the appellants make two answers. First they say H
that, whatever be the true effect of the relevant provisions of the Acts, a binding arrangement was made between themselves and Mr. Price whereby he should be entitled to receive in respect of the annuity only such a sum as represents the difference between the income of the Neale bequest and the amount of the annuity. Alternatively, they say that,

upon the true construction of the Welsh Church Act, Mr. Price ceased to be entitled beneficially to the annuity when he ceased to hold the benefice of Coity. Luxmoore, J., decided in favour of Mr. Price upon the question of the construction of the Welsh Church Acts. Moreover, he declined to infer from the materials before him that the arrangements relied upon by the appellants were ever made. Accordingly, he made an appropriate declaration in favour of Mr. Price, and the Representative Body now appeals from his judgment.

By virtue of the provisions of the Welsh Church Act, 1914, the Church in Wales was disestablished on Mar. 31, 1920. The Act made elaborate provisions for dealing with property belonging, or appropriated, to the Church in Wales. The general effect of these provisions, so far as is relevant to the present matter, was to preserve for the Church in Wales certain classes of property, including, in particular, benefactions made since 1662 (in the Act termed " private benefactions "), and to transfer the remainder either to the county councils or to the University of Wales. For the sake of brevity, we will refer to the property transferred to the county councils or to the University of Wales as " alienated property." Under sect. 8 (1) of the Act, Welsh ecclesiastical property other than alienated property ultimately became vested in the appellants, the Representative Body constituted by Royal Charter under sect. 13 (2) of the Act. Of the alienated property which, under sect. 8 (1) (*c*), (*d*), of the Act, was to be transferred to county councils, the most important was tithe rentcharge, which was not the subject of a private benefaction. As we have already stated, the tithe rentcharge belonging to or appropriated to the benefice of Coity was of this description.

It is manifest that, in fairness to holders of existing interests (of which for present purposes the most important class was that of the incumbents), it was necessary to make some provision whereby they should not be prejudicially affected by the alienation of property from which their emoluments were derived. It is also manifest that, if this provision had merely taken the form of preserving their interests in alienated property so long only as they held the benefices to which that property belonged or was appropriated, the result would have been seriously to hamper the freedom of action of the Church authorities, for there would have been a strong deterrent to transfers of the clergy from one benefice to another if such transfers were to result in a loss of church income. There could be no just reason why the new owners of the alienated property should obtain by such transfers—which did not in any way concern them—a release from a liability which would have continued during the lifetime of existing incumbents if they had remained where they were. Accordingly, the Act provided, not merely for the preservation of these interests, but also for their continuance during such time as the person in enjoyment of them should hold any ecclesiastical office in the Church in Wales. The provisions of the Act by which these results were achieved require detailed examination.

Sect. 8 of the Act, after providing for the transfer of alienated property as already stated, provided by subsect. (2) as follows :

> Save as otherwise provided by this Act, all property transferred under this section shall be held subject to all existing public and private rights with respect thereto, and all tenancies, charges, and incumbrances which may at the date of transfer be subsisting therein, and in the case of all such property, except tithe rentcharge transferred to a county council, to the existing interests of all persons who at the passing of this Act hold ecclesiastical offices in the Church in Wales, and in the case of such tithe rentcharge to the obligation to make such provision as is hereinafter mentioned in lieu of such existing interests.

" Existing " is defined by sect. 38 (1) of the Act as meaning existing at the passing of the Act—namely, Sept. 18, 1914. The effect of this provision was that, in the case of alienated property other than tithe rentcharge (such as land), the property remained subject to the existing interest of the incumbent, notwithstanding its transfer to the county council or the University of Wales, as the case might be, while, in the case of tithe rentcharge, it was transferred subject to the obligation to make provision " in lieu of " the existing interest.

If the Act had stopped there, the incumbent's right against the alienated property itself, or (in the case of tithe rentcharge) his right to claim the substituted provision, would have ceased as soon as he left the living which he held on Sept. 18, 1914, since his " existing interest " would then have determined. Accordingly, sect. 14 (1) provides as follows :

> Any person who at the date of the passing of this Act holds an ecclesiastical office affected by this Act by freehold tenure or by any tenure which, in the opinion of the Welsh Commissioners, is in practice equivalent to freehold tenure shall retain his existing interest in the emoluments of that office so long as he holds that office or any other ecclesiastical office in the Church in Wales to which he may be nominated or appointed after the passing of this Act, whether before or after the date of disestablishment.

Sect. 14 (2) provides :

> On such a person as aforesaid ceasing for six months to hold any ecclesiastical office in the Church in Wales such existing interest as aforesaid shall determine.

There is one expression in the words quoted from sect. 14 (1) which requires elucidation—namely, " interest in the emoluments " of the office. Light is thrown upon its meaning by the opening words of sect. 14 (5)—namely, " Where the emoluments of any such ecclesiastical office in the Church in Wales do not consist of an interest in any specific property," and by an expression in sect. 14 (7)—namely, " the property out of which the emoluments of that office were payable." It would appear, therefore, that, where the emoluments are payable out of specific property, the expression " interest in the emoluments " is equivalent to " interest in the property out of which the emoluments are payable." The effect of these provisions, if they had stood alone, would have been to leave the existing incumbent in enjoyment of his existing emoluments, notwithstanding that he was transferred from the benefice to which they were attached to another. Accordingly, after the passage already cited from sect. 14 (1), the following proviso is inserted :

> Provided that where any such person is nominated or appointed to any

ecclesiastical office in the Church in Wales, other than that which he held at the passing of this Act (*a*) he shall (save as otherwise expressly provided by this Act) pay over the net income of the ecclesiastical office held by him at the passing of this Act to the representative body.

We will defer for the moment consideration of the question of the application of these provisions to the case of tithe rentcharge. In the case of other property—for example, land the income from which formed part of the emoluments of a benefice—there can be no question as to their applicability. The land would be transferred to the county council under sect. 8 (1) (*d*); by virtue of sect. 8 (2) it would remain subject to the existing interest of the existing incumbent; by sect. 14 (1), (2), that interest would continue so long as that incumbent held any ecclesiastical office in the Church in Wales, and for six months longer; and, by the proviso to sect. 14 (1), the existing incumbent, on changing his parish, although still entitled to receive the emoluments derived from the land, would be bound to pay over the net income to the Representative Body, in whose hands it would be part of the general funds available for the support of the Church in Wales.

Sect. 15 deals with the case of tithe rentcharge, and contains the "provision in lieu of existing interests" promised by sect. 8 (2). The relevant words of the section are as follows:

(1) There shall be paid to each person who has any existing interest in any tithe rentcharge transferred to a county council under this Act, in substitution for and in satisfaction of that interest, and so long as that interest would otherwise have continued, the annual amount, according to the septennial average for the time being, of that tithe rentcharge, after deducting such sum as may be allowed by the Welsh Commissioners for cost of collection, rates, and other outgoings.

Under sect. 15 (2) the amounts payable are to be paid to the Representative Body "upon trust to pay over the same to the person who had such an existing interest as aforesaid."

Although the question raised on this appeal depends directly upon the later provisions of the Act relating to commutation, it is necessary to examine the situation as it would have existed if no commutation had taken place, more particularly as Mr. Christie, on behalf of the respondent, bases an argument upon these sections. He says that sect. 14 is not concerned with tithe rentcharge at all, since existing interests in tithe rentcharge are not preserved by sect. 8 (2). Consistently with this he says that the obligation of the county council under sect. 15 to make the payments there specified continues only for "so long as" the existing interest "would otherwise have continued," a phrase which he interprets as equivalent to "so long as the existing interest would have continued if this Act had not been passed." Upon this basis, if there had been no commutation, and if sect. 15 had been left to govern the case, the liability of the county council to make payments under that section would have ceased when Mr. Price ceased to hold the benefice of Coity. We are unable to agree with these contentions. If they had been well-founded, there would have arisen a situation of a highly anomalous nature. For whereas, in the case of all other alienated property, the Church in Wales would have continued to have the benefit of the existing income so long as the existing incumbent held any ecclesiastical office in it, in the case of tithe rentcharge the benefit would have ceased directly the existing incumbent gave up his existing benefice for another. No reason was suggested for this differential treatment, nor is any reason apparent. But, apart from these considerations, the Act does not, in our opinion, mean what Mr. Christie says that it means. In the first place, sect. 8 (2) speaks of the provision which the county council is to be obliged to make in the case of tithe rentcharge as being "in lieu" of "existing interests" in the tithe rentcharge. This language does not suggest that the substituted obligation is to be different in point of duration from the interest for which it is substituted: rather the contrary. The subsection read as a whole is, in our opinion, quite consistent with, and indeed points to, the conclusion that the substituted obligation is to be substituted for the existing interests as prolonged in point of duration by the later provisions of the Act. Those provisions are contained in sect. 14 (1). That subsection, apart from the proviso, appears to us to deal merely with the question of the duration of existing interests which is artificially prolonged, with the result that the existing interest is treated as "continuing" during the period of prolongation. See the words already cited from sect. 14 (7). It is to be noted that sect. 14 (1) is quite general in its language. The phrase used is "the emoluments of that office," not "the emoluments of that office so far as derived from property other than tithe rentcharge transferred to a county council." Reading sect. 8 (2) and sect. 14 (1) together, the effect, in our opinion is that all existing interests in emoluments are prolonged, that alienated property other than tithe rentcharge, remains subject to those interests so long as they continue, and that, in the case of tithe rentcharge the obligation to be substituted for the existing interest is to continue, so long as that interest would have continued but for the substitution. Is this construction consistent with sec. 15 (1)? In our opinion, it is. The true meaning of the phrase in that subsection, "would otherwise have continued," is, we think, not that contended for by Mr. Christie. It is "would but for the substitution have continued"—namely, the period prescribed by sect. 14 (1).

In this connection, it is worth calling attention to a somewhat similar expression in the proviso to the Welsh Church (Temporalities) Act, 1919, s. 4 (2)—namely, "so long as that interest would have continued," which clearly covers the extended duration of the interest. If this view is correct, the result would have been that Mr. Price would have remained entitled to receive the £528 13*s.* 6*d.* notwithstanding his transfer to Penmark. But, under the proviso to sect. 14 (1), he would have been bound upon such transfer to pay over the net income of the benefice of Coity to the Representative Body in just the same way as if those emoluments had been derived from the rents of land.

The provisions of the Act with regard to alienated property would

have led to obvious inconveniences in practice. The Act accordingly
contains a commutation scheme the object of which was to commute all
existing interests for a lump sum payment to the Representative Body.
Under the Act of 1914, the adoption of this commutation scheme was
optional in the Representative Body, but it was made compulsory by
A the Welsh Church (Temporalities) Act, 1919, s. 3 (1). The scheme is
contained in sect. 18 of the Act of 1914, and is described as a "scheme of
commutation." This description does not suggest that one of the
results of its adoption—and it is important to remember that adoption
was originally optional—would be to confer upon existing incumbents
B whose emoluments were derived from alienated tithe rentcharge a special
pecuniary advantage to the prejudice of the Church as a whole. For,
if the respondent's argument on this branch of the case be accepted, the
result will be that, whereas, if no commutation had taken place, he would
have been bound to hand over the £528 13*s.* 6*d.* to the Representative
C Body, as the result of the commutation he will be entitled to keep it for
his own benefit so long as he holds any ecclesiastical office in the Church
in Wales. It would require clear language to produce from a commutation
scheme, as it were by a side wind, a result so entirely alien to
its ostensible purpose.

D The scheme provides for the extinction of all existing interests of the
holders of ecclesiastical offices in the Church in Wales in the alienated
property; the payment by the Welsh Commissioners to the Representative
Body of a lump sum equal to the aggregate value of those interests;
and the payment by the Representative Body to the holder of the interest
E (if of freehold tenure or its equivalent) of an annuity so long as he holds
an ecclesiastical office in the Church in Wales. The provisions for fixing
the value of the existing interests and the amount of the annuity are
important. They are contained in the Fourth and Fifth Schedules
respectively. Under the Fourth Schedule, the value of an existing
F interest is to be taken as the value of an annuity during the life of the
existing holder of the office of an amount equal to the annual value of
the interest, which, in its turn, is (in the case of specific property) to be
taken to be the annual income derived from the property. Rules are
laid down as to what that annual income is to be taken to be in the
G particular cases of tithe rentcharge and land. The sum to be paid,
therefore, in order to free once and for all the alienated property (or, in
the case of tithe rentcharge, the county councils themselves) from the
burden of existing interests, was to be calculated on the basis of the
expectancy of life of the existing incumbent. This is consistent with
H the scheme of the Act under which the existing interests were to continue
in spite of transfers from one parish to another. Moreover, the
fact that this basis is taken in the case of tithe rentcharge as well as
in that of other property affords strong confirmation for the view already
expressed as to the true meaning of sects. 14 and 15 as applied to the case
of tithe rentcharge. The Fifth Schedule provides that the annuity pay-

able to the existing holder of the office is to be an amount equal, in the case of specific property, to the annual income derived from that property. Rules are laid down for determining the amount of that annual income in the case of tithe rentcharge and land. So far, there is nothing to suggest that the holder of an existing interest is to have his position improved as the result of commutation. But Mr. Christie contends that certain language in sect. 18, to which we have not yet referred, produces this result. It was in order to soften the effect of this contention, if correct, that he advanced the argument upon sects. 14 and 15 with which we have already dealt. For he said that the added benefit conferred upon Mr. Price by sect. 18, as he construed it, was at any rate not given to him at the expense of the Representative Body, since that Body would never, as he said, have received anything in respect of the Coity emoluments which would have ceased to be payable when Mr. Price left that parish. But this argument loses sight of the fact that, had the emoluments been derived from the rents of land, there would, on any view, have been a prejudice to the Representative Body, if the argument on sect. 18 be a sound one, for the argument is that the annuity payable under the commutation scheme would belong absolutely to Mr. Price in every case, whether it represented an interest in the rents of land or an interest in tithe rentcharge. Bearing these considerations in mind, we turn to sect. 18. By para. (*a*) of that section it is provided that, if the commutation scheme is accepted, the existing interests of the holders of ecclesiastical offices in the Church in Wales shall determine, and that:

> the provisions of this Act respecting existing interests in such property, and the payment of money in substitution for and in satisfaction of such interests . . . shall cease to have effect.

Para. (*b*) provides for the payment by the Welsh Commissioners to the Representative Body of:

> the aggregate value of the existing interests of holders of ecclesiastical offices in the Church in Wales in such property as aforesaid [being offices of freehold tenure or its equivalent], such value to be ascertained in manner provided by the Fourth Schedule to this Act . . .

Para. (*e*) provides that the holder of an ecclesiastical office of freehold tenure, or its equivalent:

> shall, subject to any arrangements which may be made between him and the Representative Body, be entitled, in lieu of his existing interest in such property as aforesaid, to an annuity calculated in manner provided by the Fifth Schedule to this Act, so long as he continues to hold an ecclesiastical office in the Church in Wales . . .

By para. (*f*) it is provided that:

> Every annuity payable under this section shall be charged on the property for the time being vested in the representative body, and shall be treated as part of the emoluments of the ecclesiastical office which the annuitant held at the passing of this Act . . .

The words upon which the respondent particularly relies are those cited above from para. (*a*). It is said that sect. 18 is a complete code

in itself, and that the effect of those words is to render inapplicable (among other provisions) the whole of sect. 14, including in particular the proviso to para. (1). Upon this basis it is said that the annuity conferred upon the holder of the office by para. (*e*) belongs to him beneficially throughout the whole period there mentioned. This view found
A favour with the judge, but, with all respect to his opinion, we are unable to agree with it. The words cited from para. (*a*) clearly render inapplicable the provisions of sect. 8 (2) relating to the existing interests of the holders of ecclesiastical offices. They also render inapplicable sect. 15. But sect. (14) (1) stands upon a different footing. That
B subsection does not merely deal with the preservation and duration of existing interests as against the transferees of alienated property—so far as it does so, it is, we think rendered inapplicable by sect. 18 (*a*)—but it deals also in the proviso with a totally different matter, namely, the financial relationship of the holder of the office to the Representative
C Body upon his transfer to a different office. The proviso, although in form a proviso, is in effect a substantive enacting clause, imposing upon the holder of the office, upon such transfer, the obligation to pay over to the Representative Body the whole of the net income (not, be it observed, the actual income derived from the interest) of the original office.
D Having regard to its subject matter, this proviso cannot, in our opinion, be treated as one of " the provisions of this Act respecting existing interests in such property " displaced by para. (*a*).

This construction is quite consistent with para. (*e*), and is confirmed by para. (*f*). Para. (*e*) gives the annuity to the holder of the office " in
E lieu of his existing interest." The annuity in point of duration is the same as the interest as extended by sect. 14 (1). The grant of the annuity, in our opinion, is a mere substitution for the rights in respect of the existing interest conferred by the Act. The alienated property and the bodies to whom it is transferred are freed from all obligations
F in respect of existing interests. Those obligations, or rather the substituted obligations to pay annuities of equivalent value and duration, are transferred to the Representative Body. The resulting situation must be fitted into the Act, substituting the right to receive the annuity for the existing interest. But the words already cited from para. (*f*)
G are conclusive upon this matter. Mr. Christie argued that the application of these words must be limited to the specific matters mentioned later in the paragraph. We cannot accept this argument. The words are quite general, and the specific matters are, in our opinion, merely examples of their application. How, then, can effect be given to these
H words in the present case ? If the respondent is entitled, as he claims, to retain the annuity for himself, how can it be said that it is being " treated as part of the emoluments " of the benefice of Coity ? The object of these words is, we think, to make clear what might otherwise have been left in doubt—namely, that, although the annuity is to last so long as any ecclesiastical office in the Church in Wales is held, it is

to be treated, as between the annuitant and the Church, as part of the emoluments of the original office. It therefore falls to be dealt with in accordance with the proviso to sect. 14 (1) in the same way as the income from the existing interest for which it is substituted would have been dealt with if the commutation scheme had never been adopted.

For these reasons, we are of opinion that the appellants' construction of the Act is the right one. But the appellants are also, in our view, entitled to succeed upon the other contention which they put forward—namely, that the rights of Mr. Price are governed by an arrangement made at the time when he left Coity for Penmark. The judge declined to draw any such inference as the appellants claimed should be drawn, not, as we read his judgment, because there was not sufficient material to justify him in drawing the inference that, as a matter of form, the arrangement was made, but because Mr. Morgan had no authority to bind the appellants. [His Lordship referred to the evidence.]

It appears to us that, upon these facts, the proper inference to be drawn is that at the interview on May 25, Mr. Morgan made it clear to Mr. Price that he would be entitled to receive by way of emoluments only a sum equal to his vested interest. The fact that Mr. Morgan had no authority to bind the Representative Body does not appear to us to be of importance. He unquestionably had authority to inform Mr. Price that the practice of the Representative Body was not to allow incumbents, on a change of benefice, to receive more than their vested interests, and that this practice would be followed in his case. On June 13 the General Purposes Committee resolved to follow the practice in the case of Mr. Price, and their resolution was adopted by the Representative Body on July 28, 1933. Thus, if Mr. Morgan had exceeded his authority in telling Mr. Price that he would not be entitled to more than his vested interest, his action was effectively ratified. This was the arrangement on the footing of which Mr. Price accepted the living and was inducted to it, and, upon such acceptance and induction, the terms became binding as between him and the Representative Body, and he cannot now repudiate them. The appeal must be allowed with costs.

Appeal allowed with costs. Leave to appeal granted.

Solicitors: *Deacon & Co.*, agents for *Barker, Morris & Owen*, Carmarthen (for the appellants); *Gibson & Weldon*, agents for *Northcott Howell & Co.*, Cardiff (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* ARTHUR RYAN AUTOMOBILES, LTD.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Farwell, J.), **January 26, 1938.**]

Workmen's Compensation—Accident due to negligence of third party—Employers' claim to indemnity—Claim paid—Further claim—Whether res judicata—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 30.

A post office employee was injured in an accident alleged to have been caused by the negligence of the defendants. He was paid compensation by the Postmaster-General at the rate of £1 8*s.* 8*d.* a week. On Jan. 7, 1937, the plaintiff started an action in the county court for an indemnity in repect of the compensation so paid. The defendants paid money into court with a denial of liability, and the defendants took this money out of court in settlement of their claim. Subsequently, on Apr. 9, 1937, the plaintiff started a second action claiming an indemnity in respect of further compensation payments. The defendants contended that the matter was *res judicata* by reason of the fact that the plaintiff had accepted the money paid into court in the first action :—

HELD : the matter was not *res judicata*. Each payment of compensation gave rise to a fresh cause of action under the Act.

[**EDITORIAL NOTE.** In the case where an employer, having paid workmen's compensation to one of his employees, is entitled to recover such compensation from a third party, each weekly payment of compensation is a fresh cause of action, and such employer can, if he chooses, bring an action in respect of each payment. To none of these actions could a defence of *res judicata* be pleaded ; nor can this defence be pleaded where the employer brings actions in respect of periods of a number of weeks, assuming in all these cases that the third party cannot show that the compensation has been improperly paid.

AS TO RIGHT TO INDEMNITY, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 220, para. 504 ; and FOR CASES, see DIGEST, Vol. 34, pp. 496, 497, Nos. 4094-4106. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 489-495.]

Cases referred to :

(1) *Smith* v. *Smith*, [1925] 2 K.B. 144 ; Digest Supp. ; 94 L.J.K.B. 813 ; 133 L.T. 345.

(2) *R.* v. *Cheshire County Court Judge & United Society of Boilermakers, Ex p. Malone*, [1921] 2 K.B. 694 ; 13 Digest 472, *212* ; 90 L.J.K.B. 772 ; 125 L.T. 588.

(3) *Coote* v. *Ford*, [1899] 2 Ch. 93 ; 40 Digest 425, *472* ; 68 L.J.Ch. 508 ; 80 L.T. 697.

(4) *Butler* v. *Butler* (1877), 5 Ch.D. 554 ; 26 Digest 241, *1875* ; 46 L.J.Ch. 548 ; 37 L.T. 33.

(5) *Tuckwood* v. *Rotherham Corpn.*, [1921] 1 K.B. 526 ; 34 Digest 497, *4104* ; 90 L.J.K.B. 341 ; 124 L.T. 522.

(6) *Nelson* v. *Couch* (1863), 15 C.B.N.S. 99 ; 1 Digest 15, *119* ; 33 L.J.C.P. 46 ; 8 L.T. 577.

(7) *Kelly* v. *John Wallis & Son, Automatic Scale Co.* (*Ireland*), *Ltd.* (1930), 24 B.W.C.C. Supp. 204 ; Digest Supp.

APPEAL by leave from a decision of His Honour JUDGE DUMAS at the Westminster County Court dated July 9, 1937. The facts of the case are set out in the judgments.

The Solicitor-General (*Sir Terence O'Connor, K.C.*,) and *John P. Ashworth* for the appellant.

Richards Edgedale for the respondents.

The Solicitor-General: The facts in this case have never been determined, as the first action was settled. The plaintiff could not bring an action in the county court for a declaration of liability, because the amount might exceed £100, which is the limit of jurisdiction of a county court: *Smith* v. *Smith* (1) and *R.* v. *Cheshire County Court Judge & United Society of Boilermakers, Ex p. Malone* (2). The matter said to be *judicata* was never before the court. Payment into court with a denial of liability, followed by taking the money out, prevents the *lis* from ever ripening, so the *res* cannot be *judicata.* [Counsel referred to *Coote* v. *Ford* (3), *Butler* v. *Butler* (4), *Tuckwood* v. *Rotherham Corporation* (5) and *Nelson* v. *Couch* (6).]

Edgedale: The real question here is: Does the statute give one cause of action or several? It is submitted that it gives only one. It is like suffering special damage in a negligence action. This was not an action to recover compensation, but an action for an indemnity. Declarations are often granted in a county court: see, for example, *Kelly* v. *John Wallis & Son, Automatic Scale Co.* (*Ireland*), *Ltd.* (7). When the amount passes £100, however, the defendant can stop paying. If the amount was known to be more than £100, the action should have been brought in the High Court. The defendants paid into court the amount demanded, and that is the end of the matter. Liability and amount are on the same footing, and if one is settled, so is the other. It cannot be right that an action can be brought every time compensation becomes payable.

Slesser, L.J.: In this case, the Attorney-General, acting under authority now given to him by the County Courts Act, 1934, s. 75 (1), sues Arthur Ryan Automobiles, Ltd., and Arthur Stanley Ryan, the first defendant being a limited company, and the second the driver of a motor vehicle and alleged to be the servant of that company, for the sum of £18 13*s.* 1*d.*, being compensation at the rate of £1 8*s.* 8*d.* a week from Jan. 2, 1937, to Mar. 31, 1937, paid by the Postmaster-General on behalf of His Majesty to one Matthew James Mulquin, one of the servants of the Crown, who suffered an accident arising out of and in the course of his employment on June 29, 1936, by reason of the negligence of the second defendant, Ryan, the servant of the defendant company, in the driving of a motor vehicle. The defence to that action raises the case that the plaintiff's claim was settled by an action in the same county court, brought in court on Jan. 7, 1937, and determined on or about Feb. 16, 1937, by acceptance of money brought into court by the defendants. They also say that they will rely on the plea of *res judicata*, and they put in issue the question whether Matthew James Mulquin, the servant of the Post Office, did suffer injury by the accident as alleged, or whether the defendant was guilty of any negligence.

On that plea being raised, the county court judge, for reasons which are not altogether clear to me, because no complete report of his judgment has been made, decided that the plaintiff, the Attorney-General, was A prevented from suing for £18 13*s.* 1*d.* by reason of what had happened in relation to the early proceedings on which the defendants relied. It is that question, and that question only, which comes before this court. The Solicitor-General argues that the plaintiff is entitled to continue his action in the High Court, and that, if he succeeds in establishing his B case, bringing himself within the meaning of a section of the statute to which I will refer in a few moments, he is entitled to judgment. The Solicitor-General was prematurely stopped by the county court judge. The section in question on which the plaintiff relies is the Workmen's Compensation Act, 1925, s. 30. He makes no claim under any general C right at common law, nor in any other way outside that particular section. He is bound to base his case on that section, and on that section alone. It is important, therefore, to consider that section, in order to see what it really says. It provides that:

> Where the injury for which compensation is payable under this Act, or any scheme D certified under this Act, was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof. . . . (2) If the workman has recovered compensation under this Act or such scheme, the person by whom the compensation was paid . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action. . . .

E The plaintiff's case, which was first stated in his particulars of claim of Jan. 6, 1937, was that compensation was payable in respect of the injuries of Mulquin under the Workmen's Compensation Act. The amount then was stated to be £38 4*s.* 6*d.*, being at the rate of £1 8*s.* 8*d.* a week from June 30, 1936, to Jan. 1, 1937. That was compensation F which it was alleged was paid, and in fact had been paid, without any arbitration. Next, it is said that it was paid in circumstances "creating a legal liability in some person other than the employer"—that is, the Postmaster-General. That is alleged by saying that the injury was caused by the negligence of Ryan, the servant of the defendants, acting G on their behalf. Next, it is said that he did in fact recover compensation under the Act to the extent of £38 4*s.* 6*d.*, and was paid. If those allegations be sustained, on that the plaintiff is entitled to be indemnified by the defendants, the amount of indemnity to be settled by action. That action, however, never came on for hearing, because on Feb. 12, H 1937, the plaint having been on Jan. 6, 1937, the defendants gave notice of payment into court of the total sum, and a certain sum for costs, and further gave notice that, notwithstanding such payment, the defendants denied liability. That brought the first action to an end, because the Attorney-General took the money out of court, and there was no further matter to be decided between the parties. In my view, that was a single

action. When the plaintiff proceeded, on Apr. 8, 1937, to make a claim for £18 13*s.* 1*d.*, being at the rate of £1 8*s.* 8*d.* a week from Jan. 2, 1937, to Mar. 31, 1937, both dates inclusive, alleging that that money had been paid to the workman as compensation, and claimed under sect. 30 an indemnity in respect of that sum, that claim, in my judgment, was a separate action. The language of the section makes it quite clear, to A
my mind, that the condition on which the indemnity arises is primarily that the workman must have been paid. That payment must be in respect of compensation under the Act, and the injury must be caused in circumstances creating a liability in some person other than the employer. But the actual claim arises only when the payment is made B
in fact, and such payment, in my opinion, gives rise to a separate right of action, which will succeed or will not succeed according to whether the conditions laid down in the section are or are not satisfied.

Apart from the natural conclusion which arises from a consideration of the words, any other view would create a most extraordinary position. C
Under the Workmen's Compensation Act, a workman's right to compensation depends upon a number of circumstances. The amount of it may vary from time to time, according to the extent of the workman's disability. It may well be that, after the accident has occurred, he will temporarily recover. Owing to causes which I need not enter into D
here, changes of circumstances of various sorts may arise, and these may vary the liability. In any event, it is quite impossible for an employer paying compensation to predict and to assess what sum will be required from him in future under the Act. If Mr. Edgedale's argument is correct, once an employer has been paid the indemnity for the E
sum actually paid by him, he can never recover any more money at all. It would seem, if that argument be right, that a wise employer would wait until the man was dead before he started any proceedings at all, or at any rate until he was so certainly recovered that there could never be a rescrudescence of his injury, which, in the present state of medical F
science, would be a difficult period to predict. The more reasonable, and, I think, the more proper, view, as I say, is that each time there is a payment there arises a liability to pay indemnity, if the conditions are satisfied. If that be the right view, Mr. Edgedale concedes that the payment into court in respect of the first action with a denial of liability G
cannot, on any view, affect his liability, if it is determined in the second action that he has a liability under the statute.

The judge has said something in his judgment about it being in the public interest that there should be an end of litigation. That reference seems to me to have been made on the assumption that there was only H
one action to be brought in this case. Speaking for myself, I do not think that the judge intended to base his decision on any question of *res judicata* at all. On that, of course, I can only speculate, because I have not got the complete judgment. But Mr. Edgedale concedes that, if the right view here be that there are separate causes of action, the

action for £18 13*s.* 1*d.* has never been tried before, on any view, even assuming, which I by no means accept as a proposition, that in any circumstances a payment into court with a denial of liability can create a state of *res judicata*. That is a view which, as I say, I by no means accept, and which I feel it unnecessary to discuss or decide in the present case. Once it is decided that this is a separate cause of action, it is clear, to my mind, that the whole question is now open for determination in the county court. It is open to Mr. Edgedale to show that he was not negligent, as he pleads in his defence. The case must go back, either to this or to some other county court judge, a point which we can discuss hereafter, in order that the case may be tried out. The preliminary objection which was successfully taken, that the case ought not to be heard at all, which is indeed the situation which now exists, is wrong. In my opinion, this appeal must be allowed with costs.

SCOTT, L.J.: I agree, and I only want to add very little to the judgment which has been delivered. Counsel for the respondent dealt in rather an indefinite way with the argument that it would be inconvenient should the law be that which SLESSER, L.J., has just declared it to be. I see no inconvenience at all which can result from that interpretation of the law. If the third party says that he was not negligent, he can raise that issue on the first claim for indemnity made under the section. If that issue is decided in his favour, he will then, if the claim is renewed on a further payment being made, be entitled to set up the plea of *res judicata*, that the issue has already been decided *inter partes* between him and the employer that there was no negligence of his which was responsible for the accident, and there will then be an end of his liability to make indemnity. On the other hand, if it is decided that he was negligent, that issue will have been decided once and for all between the employer and him. The only question of liability that the third party will thereafter be entitled to raise will be in connection with the payments by the employer to the workman on any suggestion that the payment made at any subsequent date was not a payment in accordance with the provisions of the Workmen's Compensation Act. Otherwise—and this is the ordinary case—it will be simply a question of ascertaining the amount that became payable at subsequent dates, and was paid, pursuant to the words of sect. 30 (2), by the employer to the workman. If that is the procedure contemplated by the section, there is no inconvenience that can attend upon the decision that we have given. It is perfectly simple. In my view, the provisions of the section are the only provisions which could have been made conveniently for the purpose of enabling the employer to recover indemnity from the third party, for the simple reason that, under the Workmen's Compensation Act, one can never tell in advance what will be the future liability to compensation falling upon the employer, and in respect to which the statute gives him the right of indemnity.

That being the right of action conferred by the section, the only other question is one of procedure. It is true that in the county court the claim is limited to £100, but for practical purposes, by reason of the operation of the doctrine of *res judicata*, it would be possible in the county court to establish a right on the part of the employer to receive in the future payments of indemnity, just because he will always be able A to rely upon the doctrine of *res judicata*. Should there be a case, which is possible, of great difficulty, it is open to the employer to bring his action for indemnity in the High Court, if he so chooses. He may be able there to get a declaration of a kind more useful to him than the doctrine of *res judicata* by itself. I doubt whether it is likely that such cases will B often occur, but it is open to him to do so.

That being so, the provisions of the section seem to me not only to be clear, but also to cause no inconvenience in practice.

FARWELL, J.: I agree. I have only a few words to add. The C whole of this case, in my judgment, depends upon the true construction of this section, and on nothing else. Once one comes to the conclusion, to which I have come, that there is no cause of action in a case of this kind until a payment is made, it necessarily follows that, on each payment being made, a fresh cause of action arises. That is all I desire D to say.

Appeal allowed with costs.

Solicitors: *Solicitor to the Post Office* (for the appellants); *William Charles Crocker* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*] E

YUKON CONSOLIDATED GOLD CORPN., LTD. *v.* CLARK.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **January 18, 1938.**]

Conflict of Laws—Foreign judgment—Action on judgment—Judgment of Supreme F *Court of Ontario—Stay—Appeal to Privy Council—Administration of Justice Act*, 1920 (*c.* 81), *ss.* 9 (1), 13, 14—*Foreign Judgments* (*Reciprocal Enforcement*) *Act*, 1933 (*c.* 13), *ss.* 1, 6, 7—*Reciprocal Enforcement of Judgments* (*General Application to His Majesty's Dominions, etc.*) *Order*, 1933 (*S.R. & O.*, 1933, *No.* 1073).

The defendant brought an action against the plaintiff company in the G Supreme Court of Ontario. The action was dismissed with costs, and an appeal to the Court of Appeal in Ontario was also dismissed with costs. The costs were duly taxed and a part of them paid or satisfied by money paid in by the defendant. The defendant gave notice of appeal to the Privy Council, and, as required by the rules of the Court of Appeal of Ontario, he gave security for the costs of that appeal. The plaintiff company sought to recover in England the balance of the costs payable H in respect of the earlier proceedings. The defendant contended that the plaintiff company could not sue upon the Ontario judgment, having regard to (i) the Administration of Justice Act, 1920, s. 9 (1), and (ii) the Foreign Judgments (Reciprocal Enforcement) Act, 1933, ss. 1, 6, 7, and the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933:—

HELD: (i) the Foreign Judgments (Reciprocal Enforcement) Act, 1933, ss. 6, 7, apply to a Dominion only where there is an Order in Council extending the provisions of that statute to that particular Dominion.

(ii) the action, therefore, ought not to be stayed.

SEMBLE: Sect. 7 of the Act of 1933 must be read as applying only to the judgments of superior courts of a Dominion.

A *Decision of* MACKINNON, J. ([1937] 2 All E.R. 343) *affirmed.*

[**EDITORIAL NOTE.** In this case the Court of Appeal have affirmed the decision of MACKINNON, J., as to the construction of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, so far as it relates to the Dominions. The view taken is also in accordance with that expressed in practice books, to the effect that there must be an order applying the provisions of the Act to the Dominions generally B before there can be an order applying them to any particular Dominion, and that there must be a second order applying them to any particular Dominion.

AS TO RECIPROCAL ENFORCEMENT OF JUDGMENTS, see HALSBURY, Supp., Vol. 6, Conflict of Laws, para. 380; and FOR CASES, see DIGEST, Vol. 11, p. 471. See also YEARLY SUPREME COURT PRACTICE, 1938, pp. 734-738.]

C APPEAL from a decision of MACKINNON, J., dated Mar. 22, 1937, and reported in [1937] 2 All E.R. 343. The facts in the case are set out in the judgments.

J. P. Eddy, K.C., and *F. H. Lawton* for the appellant.

H. St. John Field, K.C., and *Gerald Gardiner* for the respondents.

D *Eddy, K.C.:* The judge had no power to hear this case. An Order in Council was made in relation to Ontario; therefore the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 6, applies, and this action could not be brought, as it is not a proceeding for the registration of a judgment. There was no necessity for any second Order in Council. The E Supreme Court of Ontario is a superior court.

Field, K.C.: Insufficient attention has been paid to the very careful wording of this statute. There is a careful distinction between "extended" and "applied." The provisions of the Act must first be "extended" to a country under sect. 1, before they can be F "applied" under sect 7. Otherwise, there has been a complete revolution in the jurisdiction of the whole Empire without anyone having suspecting it, i.e., every court in the Empire has granted rights of registering English judgments. The Act does contemplate two Orders in Council.

G *Eddy, K.C.*, in reply: Sect. 7 (2) is dealing solely with the case where there is already an order under the 1920 Act. In this case, there is no need for a second order, as this case is dealt with under sect. 7 (1). It would be a curious position if action could not be brought here, but could be brought in an inferior court elsewhere in the Empire.

H GREER, L.J.: The question in this case involves the true meaning of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, ss. 6, 7. I have come to the conclusion, on full consideration of the argument, that I ought to agree with the view which is expressed by the editors of the ANNUAL PRACTICE and the YEARLY SUPREME COURT PRACTICE, and with the order made by the judge.

The history of the matter is as follows. Until the Act of 1933, there was no restriction imposed on the right of a litigant, if he chose to do so, to sue at common law upon a foreign judgment, if he could serve his writ. At one time, he was sometimes in difficulty in bringing his case within the code for service outside the jurisdiction, but he could sometimes have the good fortune to catch his foreign debtor in this country, and sue him by serving him in this country. As I read the Act of 1920, that Act did not in any degree take away his right to sue on either a foreign judgment or a colonial judgment, but gave him a right to register in the case of any Dominion, or indeed of any colonial, judgment, if he could show that it was a binding judgment, subject to the power of the court to deal with the costs incurred in registering his judgment. The Act of 1920 provided for the registration of a judgment in His Majesty's Dominions, but did not deal with foreign judgments. That Act is called the Administration of Justice Act, 1920, and the heading is :

> An Act to amend the law with respect to the administration of justice and with respect to the constitution of the Supreme Court, to facilitate the reciprocal enforcement of judgments and awards in the United Kingdom and other parts of His Majesty's Dominions or Territories under His Majesty's protection.

Part II of the same statute is headed :

> Reciprocal enforcement of judgments in the United Kingdom and in other parts of His Majesty's Dominions.

The Act did not in any way deal with foreign judgments, but it was fully appreciated by those who thought about foreign judgments that British judgments were never enforced as of right in foreign countries, and that was believed, and rightly believed, to operate as an injustice to this country. Whereas we enforced foreign judgments by means of action in this country, foreign countries refused to enforce the judgments obtained in this country, and it was to deal with that situation that the statute of 1933 was passed. Incidentally, however, it also dealt with judgments of the Dominions. It seems to me to be quite clear with regard to sects. 1 and 2 of the Act of Parliament that the statute is concerned with the enforcement of foreign judgments and Dominion judgments, where it could be established that there were reciprocal rights in the foreign countries or in the Dominions, and, when we come to the relevant sections, it was provided, because the foreign countries with which we entered into negotiations required that it should be provided, in order to obtain their agreement to a convention with regard to the reciprocal obligations of this country and the foreign country for the enforcement of the judgment :

> No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.

That is the first time that there has ever been any restriction upon the doctrine that a foreign judgment created a debt which could be enforced in this country. Then sect. 7 goes on to say :

> (1) His Majesty may by Order in Council direct that this part of this Act shall apply

> to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions as it applies to foreign countries and judgments obtained in the courts of foreign countries . . .

I read that now, on consideration, as meaning that it applied to the Dominions only to the extent to which it had been applied by the statute to foreign judgments. I thought at one time that I might put a wider meaning on it, but, on consideration, I do not think that I am entitled to put into sect. 7 words which would very much alter the effect of that section. If we look at sect. 7 (2), we find these words :

> If at any time after His Majesty has directed as aforesaid [under the earlier part of the section] an Order in Council is made under sect. 1 of this Act extending Part I of this Act to any part of His Majesty's dominions to which the said Part II extends as aforesaid, the said Part II shall cease to have effect in relation to that part of His Majesty's dominions.

And that only after an order has been passed extending Part I of the Act to any part of His Majesty's Dominions. Then an order called the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions) Order, 1933, was made, and it says this :

> Now, therefore, His Majesty, by virtue and in exercise of his powers under the said Act, is pleased . . . . to order . . . . (1) Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, shall apply to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions and to territories which are under His Majesty's protection. . . .

It seems to me a strange construction of the Act and the order to say that, where the section says it shall apply to Dominion as it applies to foreign judgments, then, though it is quite clear that, in the case of foreign judgments, reciprocal arrangements have to be proved to bring the Act into force, in the case of the Dominions there is no necessity for proving that there is any reciprocity. In that respect, I think that the argument is not well-founded, because I think that the statute does mean to say that, where there is, and only where there is, an order extending the Act to that particular Dominion in question, the provisions of sect. 7 and of the order made under the Act apply to the Dominion and to the judgment in question.

We have heard a good deal about the Saskatchewan order, and we are asked to say that, because there is an exception which would apply to the Saskatchewan order, therefore the whole section must be read as if an extension order had already been made, though we know as a fact that no such extension order has been made. For these reasons, I agree with the judge that sects. 6 and 7 of the Act will not apply until there has been an Order in Council extending the provisions of the statute to the Dominions, and to judgments obtained in those Dominions.

On the question as to whether the section as drawn refers to any court in a Dominion, I am inclined to think that, taking the whole statute together, one ought to insert before the word "court," to give a proper interpretation to the section, the word "superior," so that it would be "superior court of the said Dominion." Be that as it may, however, it does not make any difference to the fact that the judgments can be enforced only in the same way as and to the same extent that foreign judgments can be enforced, which, *ex concessis*, cannot be enforced until reciprocity is obtained. I think that the Dominion judgments are upon the same basis as are foreign judgments and I agree with the judge that, in those circumstances, sects. 6 and 7 have no application to this case, and leave the plaintiff in this case untrammelled with regard to his rights at common law, so that he can sue on the judgment. He has sued upon the judgment, and on that ground he is entitled to go on with the action. I agree that this appeal should be dismissed, and dismissed with costs.

SLESSER, L.J.: I am of the same opinion. In order to arrive at a conclusion in this case, it is necessary to consider two statutes: the Administration of Justice Act, 1920, Part II, and the Foreign Judgments (Reciprocal Enforcement) Act, 1933. Under the earlier Act of 1920, power was given, in circumstances which I will describe, to register judgments. There was no prohibition such as is to be found in sect. 6 of the Act of 1933, for proceeding for the recovery of a sum other than proceeding for the registration of a judgment, but, nevertheless, I find in that earlier Act—dealing, as it does, only with registration—considerable assistance in the interpretation of the 1933 Act, which is the Act immediately to be considered here. By the Administration of Justice Act, 1920, Part II, s. 9, as I have said, it is provided that registration may be effected, but there is a general provision that that section and the consequent sections shall be enforced only by Orders in Council, and the specific provisions which have here to be considered are sects. 13 and 14. Sect. 13 is dealing with territories under His Majesty's protection, or in respect of which a mandate is being exercised by the Government, and any part of His Majesty's Dominions, and it is provided that by Order in Council His Majesty may declare that this part of this Act shall apply to any part of this territory as if that territory were part of His Majesty's Dominions. That is, if an order is made, the territory becomes, for the purpose of the application of Part II of the 1920 Act, part of His Majesty's Dominions. When we turn to sect. 14, we find a difference in the language:

> (1) Where His Majesty is satisfied that reciprocal provisions have been made by the legislature of any part of His Majesty's dominions outside the United Kingdom for the enforcement within that part of His dominions of judgments obtained in the High Court in England, the Court of Session in Scotland, and the High Court in Ireland, His Majesty may by Order in Council declare that this part of this Act shall extend to that part of His dominions, and on any such order being made this part of this Act shall extend accordingly.

It is therefore clear to my mind that, under the Act of 1920, if one is dealing with a territory, it is necessary that two orders should be made, the first order applying to the territory in order to bring it into the position of a Dominion, and a second order, to be made when His Majesty is satisfied that the provisions for the necessary reciprocal enforcement exist, that that part of the Act shall extend to that part of the Dominions.

In the case of the Dominion itself, of course, since the Act applies to it immediately, the earlier Order in Council which applies the provisions of the Act to a territory would not be necessary. All that would be necessary would be the satisfaction as to reciprocal enforcement. That is the position under the Act of 1920. In 1933 this addition was made to the general machinery of the Act, and its functions: that under sect. 6 :

> No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.

As GREER, L.J., has said, this Act therefore extends the prohibition and other provisions to foreign judgments as well as to judgments in Dominions and territories. The provisions as to foreign judgments are quite clear. There is really no dispute that the Order in Council applying Part I of the 1933 Act (which includes sect. 6) to foreign countries is limited in the sense that His Majesty must be :

> satisfied that, in the event of the benefits conferred by this part of this Act being extended to judgments given in the superior courts in any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts of the United Kingdom . . . .

That is one question, that there shall be substantial reciprocity of treatment. Then the matter is also limited, as it had been limited by the Act of 1920, in the case of Dominions, to superior courts. Sect. 1 (2) says :

> Any judgment of a superior court of a foreign country to which this part of this Act extends.

In order to define a superior court, it is provided that that shall be defined in the order. Sect. 1 (*b*) says that the Order in Council may direct :

> That such courts of that foreign country as are specified in the order, shall be deemed superior courts of that country for the purposes of this part of this Act.

The reason for that provision was that the term " superior court " is a term of art of a local nature. There are, strictly speaking, two ways in which a court may properly be called a superior court. It may be a superior court of record—that is, a superior court at common law, as is stated in BACON'S ABRIDGEMENT, TITLE COURTS :

> Superior courts of record are again, those that are more principal or less principal ; the more principal ones are the Lords House in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer ; and by Hale, such are the justices itinerant *ad communia placita* and *ad placita forestae*. The less principal ones are such as are held by commission of gaol-delivery, *oyer* and *terminer*, assize, *nisi prius*, etc . . . .

In addition to that, there have been from time to time (it is not necessary to go through them) statutory definitions stating which courts are superior courts, all words which are quite inappropriate to foreign tribunals, which therefore have to be defined by order, or some other appropriate instrument, as being superior courts in order to satisfy the requirements of sect. 1 of the Act. So much for foreign judgments. Now one can pass to sect. 7, which is the case we have here to consider, of a judgment in a Dominion. That states that His Majesty, by Order in Council, may direct that the Act shall apply to His Majesty's Dominions outside the United Kingdom, and to judgments obtained in the courts of the said Dominion, as it applies to foreign countries, and judgments obtained in A the courts of foreign countries. Pausing there, the word "apply," it will be noticed, is a wording similar to that which has been used in the 1920 Act, applying the Dominion position to a territory. It says that the Act shall "apply." It passes over altogether, to my mind, the question of the requirements, both with regard to reciprocal enforcement B and with regard to superior courts, which are stated in sect. 1. It goes on:

> as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of His Majesty so directing, this Act shall have effect accordingly. C

In accordance with that provision, there was a statutory order made on Nov. 10, 1933, which recites the provisions which I have already mentioned, and says in its operative part that Part I of the Foreign Judgments (Reciprocal Enforcement) Act shall apply to His Majesty's Dominions outside the United Kingdom. It goes on to deal with territories under D His Majesty's protection. It will be noticed that in that order, which is merely dealing with the application of the Act as directed, there is no reference whatever to any particular part of His Majesty's Dominions. It refers to the whole Dominions without exception. Secondly, it does not deal in any way with any question of reciprocal enforcement of E judgments, which is said to be the purpose of the order, the title being "The Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions) Order." If Mr. Eddy is right, and this order has immediately to apply the provisions of, among others, sect. 6 of the Act of 1933, it has applied them indifferently to the whole of the courts F of His Majesty's Dominions, regardless of whether or not they have entered into reciprocal arrangements for the enforcement of judgments of the courts in England. I see no reason to suppose either that such an extraordinary result was intended or that it has been produced. It is contrary to the provisions both of the Act of 1920 and of the Act of 1933. G It is contrary to the purpose of those Acts, in that they are dealing with the enforcement of judgments reciprocally. On that, I think that perfect sense may be made of the section by reading it in the way for which Mr. St. John Field contends—namely, that, that order having been made applying the Act to Dominions, which would otherwise apply only H to foreign countries, that put the Dominions in the same position with regard to their judgments as that in which they would have been had they been foreign judgments under sect. 1. I think that that is what sect. 7 says. It says that, on the order being made, this part of the Act shall apply to His Majesty's Dominions as it applies to foreign countries, and to judgments obtained in the courts of foreign countries. Then we are therefore directed to sect. 1, and we find, bearing in mind that the Dominions come within the ambit of the Act as well as the foreign countries, that His Majesty, if he is satisfied that, in the event of the benefits conferred being extended to judgments given in the superior courts of any Dominion, substantial reciprocity of treatment will be assured, may by Order in Council direct that this part of that Act shall apply to the Dominions, and that such courts of that Dominion as are specified in the order shall be deemed superior courts of the country for the purposes of this part of this Act.

The only matter I have further to remark upon is with regard to the provision at the end of subsects. (1) and (2)—on the direction being made that it shall apply to the Dominions as it applies to foreign countries :

> in the event of His Majesty so directing, this Act shall have effect accordingly and Part II of the Administration of Justice Act, 1920, shall cease to have effect except in relation to those parts of the said dominions to which it extends at the date of the order.

That is to say, that it was to apply generally to the whole of His Majesty's Dominions outside the United Kingdom, but that those orders which had already been made under the provisions of the Act of 1920 should continue to have validity. That does not, to my mind, in any way indicate that it is not necessary in those parts of His Majesty's Dominions as to which no order was made under the Act of 1920 that there should be a specific Order in Council extending the provisions of Part I of the Act of 1933 to them, after there had been a general direction applying the Act to the whole of His Majesty's Dominions outside the United Kingdom. Subsect. (2) seems to me to indicate, notwithstanding the argument of Mr. Eddy, that that was the intention of the legislature, because it says :

> If at any time after His Majesty has directed as aforesaid [made an Order in Council generally applying the Act to the dominions] an order in Council is made under sect. 1 of this Act extending Part I of this Act to any part of His Majesty's dominions to which the said Part II extends as aforesaid, the said Part II shall cease to have effect in relation to that part of His Majesty's dominions.

What Mr. Eddy argues is that, in so far as the places to which the order under the Act of 1920 applies were excluded from the general Order in Council applying the statute to His Majesty's Dominions, this does no more than to say that an Order in Council may be made bringing that particular part within the ambit of that Act of 1933. I think that the error in that argument is that, on the assumption that the Order in Council applying the Act is general, it would apply, if he is right, to the whole of the British Dominions, notwithstanding the fact that the orders made under the Act of 1920 still exist in a part of those Dominions. The order, in other words, would be absolutely general, as it purports to be. That is, it applies to His Majesty's Dominions—that is, to parts where orders were or were not made under the Act of 1920. But it says that the orders made under the Act of 1920 shall continue to exist, notwithstanding the general order, and alongside of the general order, in so far as they were made under the Act of 1920. If that was right, then I cannot see what power there would be in His Majesty to make yet another Order in Council dealing with that order, which, under the Act of 1920, still had effect. I think that, on the other hand, on Mr. St. John Field's view, the whole thing is quite intelligible. If, as he submits, and I think rightly, two Orders in Council are necessary, one to apply the Act generally, and the second to extend it to particular areas, then subsect. (2) is dealing with an extension to an area in which an order has already been made under the Act of 1920. It gives power to make a second Order in Council dealing with that part. On that view, the whole matter seems to me to be consistent. Therefore, within the language of the Act, the mischief of the Act, and the common sense of the whole position, I think that the judge was right in holding that the Order in Council does no more in the first instance than apply the Foreign Judgments Act to the Dominions, and thereafter it is necessary to make such orders by way of extension as if the judgment had been the judgment of a foreign court, and not the judgment of a Dominion.

Scott, L.J.: I agree with both judgments. I would like to add a few observations as to the method of drafting the Act of 1933, which seems to me quite clear. Till that year, foreign judgments had not been dealt with in this country except by the old procedure of an action upon them. Sects. 1 to 5 introduced provisions enabling Orders in Council to be made on certain conditions applying a new system of enforcing—namely, registration. The conditions were substantially (i) that the arrangement should be limited to superior courts, and (ii) that there should be reciprocity. On those conditions, the five sections of the Act enabled detailed Orders in Council to be made in respect of individual foreign countries, and by sect. 1 (1) power was given by Order in Council to direct that this part of the Act should extend to that foreign country, and, secondly, such courts of that foreign country as were specified in the order should be deemed to be superior courts of that country for the purpose of this part of this Act. Bearing those provisions in mind, I turn to sect. 7 of the Act. Sect. 7 (1) in my view contains an enabling power delegating to His Majesty in Council power to legislate—namely, applying the Act as regards foreign countries and foreign judgments to countries within the British Empire. It might quite well have been drafted by employing a different method—for instance, a resolution of each House of Parliament applying the Act to colonies within the British Empire. Instead of that, the enabling power is conferred upon His Majesty in Council, but the whole operation of sect. 7 (1) is simply to make Part I of the Act of 1933 apply as a whole to countries within the British Empire, and to protectorates and mandated territories, just as foreign countries are made to come within the Act by the first five sections of the Act. Subsect. (1), by itself, has no operative effect on any part of the British

Empire. In order to bring a particular part of the Empire within the operative provisions of Part I of the Act, it is necessary that there should be a further Order in Council, just as, under sect. 1 of the Act, there has to be an Order in Council applying the provisions of the Act to a particular foreign country. If one reads subsect. (2) in that way, it is quite clear: if, at any time after His Majesty has, by Order in Council under sect. 1, directed as aforesaid that the Act shall apply to His Majesty's Dominions, then Orders in Council may be made under sect. 1 of the Act in accordance with the whole procedure of sect. 1 and subject to the conditions of sect. 1. That means that there must be the satisfaction of the Privy Council that the conditions of subsect. (1) as to reciprocity and as to a suitable list of superior courts are complied with, before the Order can be made. Until a detailed order of that kind is made, there is no power at all to apply the Act of 1933 to any particular Dominion or territory within what we call the British Empire. The word "Dominion," of course, is used in its wide sense, and not in any way in the narrow sense of the four great Dominions. For these reasons, I am quite clear that the order of the judge was right.

Appeal dismissed with costs.

Solicitors: *Percy Haseldine* (for the appellant); *Broad & Son* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re BOROUGH, PUBLIC TRUSTEE *v.* ROBERTS-GAWEN.

[CHANCERY DIVISION (Simonds, J.), **January 14, 1938.**]

Estate and other Death Duties—Legacy duty—Legacies expressly given "free of duty"—Direction to pay "death duties (payable in consequence of my death)"—Incidence of legacy duty in respect of legacies not expressed to be free of duty.

The testator by his will gave a number of legacies free of duty, and other legacies which were not expressly stated to be free of duty. The residuary clause provided for the payment of funeral and testamentary expenses, "and all death duties (payable in consequence of my death)." It was contended that the legacies which were not expressly given free of duty were by these last words made free of duty:—

HELD: the words "death duties (payable in consequence of my death)" here meant the duties which would in any event be payable in respect of property passing on the death, whatever disposition might be made of it by the testator, or even if he made no disposition of it at all. The legacy duty on the legacies not given free of duty therefore was not payable out of the residue.

[EDITORIAL NOTE. This case is of considerable importance in the drafting of wills, since the words here used are commonly used to distinguish between death duties payable on the testator's death and those which only become payable at a later date, e.g., upon the death of a tenant for life. These precise words having here been construed as meaning, in effect, the estate duty upon the property passing on the testator's death, it would seem desirable, if not essential, to use different words where it is intended to distinguish between death duties payable at different times.

AS TO LEGACIES FREE OF DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 337-340, para. 370; and FOR CASES, see DIGEST, Vol. 21, pp. 77-82, Nos. 522-581.]

Cases referred to: A

(1) *Re Massey, Ram* v. *Massey* (1920), 90 L.J.Ch. 40; 21 Digest 7, *20*; 122 L.T. 676.

(2) *Re Hampton, Hampton* v. *Mawer* (1918), 62 Sol. Jo. 585; 21 Digest 5, *6*.

ORIGINATING SUMMONS to determine what (if any) duties are payable out of the residuary estate of the testator in respect of the bequests B contained in cls. 4, 6, 9 and 10 of the testator's will save where any such bequests are expressly stated to be free of duty.

T. A. C. Burgess (*Wilfrid M. Hunt* with him) for the plaintiff.

J. Leonard Stone for the first, second and fourth defendants.

L. W. Byrne for the third defendant. C

Stone: Unless the direction in cl. 11 of the will is treated as being a ministerial direction, there is a conflict between cl. 11 and the other clauses in the will. The only legacies which are given free of duty are those with regard to which the testator has so stated. It would have an extraordinary effect, in a case where the testator has given some legacies D free of duty, and has expressly said so, if others were to be so paid by reason of a direction in the will that the executors should do various things which would have to be done in any event. The clause directing the payment of death duties payable in consequence of the testator's death does not mean any more than that the duties he has directed should E be paid. [Counsel referred to *Re Massey, Ram* v. *Massey* (1).]

Byrne: The expression "death duties" must be given its ordinary meaning, and it means all duties which fall to be paid as a result of the death. There is a close similarity between legacy duty and succession duty, and it is difficult to say that one should be included in the expres- F sion "death duties" and the other not. The case most nearly similar to the present case is that of *Re Hampton, Hampton* v. *Mawer* (2).

SIMONDS, J.: This case adds one more to the large army of cases in which difficulty has arisen as to the incidence of death duties. In this G case the testator, one Thomas George Borough, appointed his brother Charles Gawen Roberts-Gawen and the Public Trustee to be his executors. He made a specific devise of his undivided shares and interests in certain property, to which I need not further refer, as the question which had been raised in regard to that gift is no longer before the court. Then H there is a gift to his sister, Jane Charlotte Bowles, absolutely of all his manuscripts and books. In regard to that gift, it is necessary to observe only that it it not expressed to be free of duty. Then there is a gift of certain other chattels to his brother absolutely, and then there is a gift of certain shares absolutely, but in neither case is there any expression that the gift was to be free of duty. Then next comes a gift to his sister, Jane Charlotte Bowles:

> during her life for her separate use without power of anticipation an annuity of £100 free of duty.

Then in cl. 9 there is a gift of a number of pecuniary legacies, and it is to be observed that, of those pecuniary legacies comprised in that clause, two are expressed to be free of duty and four are not so expressed. Then in cl. 10 there are further gifts of pecuniary legacies, twelve in number, of which five again are selected as being given free of duty, and seven are not so given. Nobody can read so far without forming the clearest possible impression that the testator was discriminating between some beneficiaries and others, and that to some he was giving their legacies free of duty while to others he was giving their legacies not so free of duty. It must require, in my view, a very strong indication in some other part of the will if it is to be determined that all the legacies are to be free of duty.

The residuary bequest is in terms which are substantially common form. There is a gift of all the residue and of the testator's estate and effects upon trust for sale and conversion:

> and upon the further trust out of the money to arise from the sale and conversion of my said real and personal estate and out of my ready money to pay my funeral and testamentary expenses. . . .

Then come these words:

> and all death duties (payable in consequence of my death) and my debts and also to pay or provide for the legacies and annuities hereby or by any codicil hereto bequeathed and to invest the residue of the said money. . . .

Then the ultimate residuary estate, called the trust fund, is to be held upon trust to pay the income to the testator's brother, Charles Gawen Roberts-Gawen, for his life, with a gift over as between his nephew John George Burton Borough and Humphrey Charles Bradshaw Bowles in certain shares. Reliance is, of course, placed upon the direction to pay "death duties (payable in consequence of my death)." Is it necessary to give to those words the wide meaning for which Mr. Byrne contends, so that not only those legacies which are given free of duty, but also those which are not given free of duty shall in fact be free of duty? In my opinion, it is not. It is easy to give to those words a meaning of not so wide a character. It is easy and, in my view, it is right, in this case—to construe those words as meaning only the duties which are payable in consequence of the death. That is to say, the estate duty which is payable in consequence of the death in respect of property passing on the death, whatever may be the disposition made by the testator, or, indeed, if no disposition is made by him at all, so that he dies intestate. In my view, the words "all death duties (payable in consequence of my death)" in this context in this will do not include the legacy duty which is payable in respect of the annuities and legacies. They are provided for in this way: the gift of a legacy of a certain sum free of duty is in law a legacy of that sum and of the duty which is payable upon it. So we have here a ministerial direction to pay the legacies, which includes both the legacies of so many pounds and the duty which is payable upon those sums.

Accordingly, the question which is asked by Question 1 (*b*) of the summons must be answered: "Payable by the respective legatees or beneficiaries."

Solicitors: *Emmet & Co.* (for all parties).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re WHITE, SKINNER *v.* ATTORNEY-GENERAL.

[Chancery Division (Clauson, L.J.), **December 15, 16, 1937, January 25, 1938.]**

Estate Duty—Testator domiciled in Northern Ireland—Annuity given to widow—Property locally situate in Northern Ireland at testator's death and duty there paid—Part of property locally situate in England at widow's death—Liability to duty—Whether exemption still applicable—"Property upon which estate duty already paid"—Finance Act, 1894 (*c.* 30), *ss.* 2 (1) (*b*), 5 (2)—*Finance Act,* 1914 (*c.* 10), *s.* 14—*Government of Ireland Act,* 1920 (*c.* 67), *ss.* 8, 61—*Government of Ireland* (*Adaptation of Taxing Acts*) *Order,* 1922 (*S. R. & O.,* 1922, *No.* 80).

The testator, who died on July 27, 1923, domiciled in Northern Ireland, had, by a testamentary disposition dated Dec. 2, 1920, given an annuity of £7,500 to his wife. At the date of his death, only property to the value of £66 was locally situate in Great Britain, and no estate duty was then payable in Great Britain. Duty was, however, paid in Northern Ireland. On Feb. 5, 1936, the testator's widow died, and at that date the property charged with the payment of her annuity consisted in part of investments locally situate in England, in part of investments locally situate in Northern Ireland, and in part of property situate in the United States of America. A claim was put forward for estate duty in England in respect of the English investments as property deemed to pass on the death of the widow. It was contended (i) that the widow had no interest in these investments, but only a right to bring an administration action in Northern Ireland, and (ii) that, by the operation of the Finance Act, 1894, s. 5 (2), no duty was payable on the death of the widow, as estate duty had been paid on the death of her husband:—

Held: (i) in measuring the extent of the property in respect of which the duty is leviable by the English revenue authorities, the annuity must be treated as charged proportionately upon the various items of property constituting the estate upon which it was charged.

(ii) the annuity constituted a charge upon the English investments, and duty was payable thereon in England.

(iii) the words "estate duty" in the Finance Act, 1894, s. 5 (2), mean estate duty in England, and, in cases arising after the provisions of the Government of Ireland Act, 1920, become operative in this respect, do not include estate duty in Northern Ireland, and the exemption by reason of the payment of duty upon the death of the other spouse of a marriage did not apply.

[EDITORIAL NOTE. The right of an annuitant where there is a gift of an annuity followed by a residuary gift has been said to be such that the residuary legatees

have no right to receive anything until the annuity has been discharged. Such a right, amounting clearly to a charge upon the property, seems plainly to be more than a right to ask for the administration of the estate. The exemption which was given by the Finance Act, 1894, s. 5 (2), has been amended by the Finance Act, 1910, s. 55, and by the Finance Act, 1914, s. 14, and now applies only to the case of the duty payable on the death of the surviving spouse, where duty has been paid A on the death of the deceased spouse; but even this remaining exemption is now held not to apply where the previous duty was not paid to the revenue authorities in Great Britain.

AS TO THE SCOPE OF DEATH DUTIES IN GREAT BRITAIN, see HALSBURY, Hailsham Edn., Vol. 13, pp. 226, 227, paras. 211-213; and FOR CASES, see DIGEST, Vol. 21, p. 17, Nos. 89-96.]

B Cases referred to:

(1) *A.-G.* v. *Watson*, [1917] 2 K.B. 427; 21 Digest 10, *37*; 86 L.J.K.B. 1034; 117 L.T. 187.

(2) *A.-G.* v. *Clarkson*, [1900] 1 Q.B. 156; 21 Digest 45, *288*; 69 L.J.Q.B. 81; 81 L.T. 617.

C ADJOURNED SUMMONS. The plaintiffs were the surviving executors of the will and codicil of John Campbell White, who died domiciled in Northern Ireland on July 27, 1923, and they asked for the determination of the following question: Whether upon the death of Edith Evelyn White the widow of John Campbell White and an annuitant under the D will and codicil of the said John Campbell White dated Dec. 8, 1918, and Dec. 2, 1920, respectively estate duty became payable in England upon any of the English investments in which the moneys arising from the sale and getting in of the estate of the testator which at the date of his death consisting of property situate out of England were subsequently E during the lifetime of the testator's widow invested by the executors of the testator and remained so invested at the date of the death of the testator's widow.

J. M. Whitaker for the applicants.

J. H. Stamp for the respondent.

F This case was heard by CLAUSON, J., on Dec. 15, 16, 1937, when he reserved his judgment, and before the following judgment was delivered, on Jan. 25, 1938, he had been appointed a lord justice of appeal.

CLAUSON, L.J.: On Dec. 8, 1918, the Right Honourable John G Campbell White of Craigavon, County Down, Ireland, after appointing certain executors, bequeathed to his wife free of duty a life annuity of £5,000, and, after giving another annuity and certain legacies, devised and bequeathed all his property both real and personal to his nephews Edward John Skinner and Robert Skinner in equal shares, subject to H and charged with the payment of his debts, funeral and testamentary expenses and all Crown duties and the legacies and annuities bequeathed by his will. By a codicil dated Dec. 2, 1920, the testator increased his wife's life annuity from £5,000 to £7,500. On Dec. 23, 1920, the Government of Ireland Act, 1920, became law, and on Dec. 22, 1921, the financial provisions of that Act, including provisions as to taxation, became operative. On Jan. 31, 1922, an Order in Council entitled the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922, came into force.

It is not necessary for the purposes of the present case to travel in detail through the provisions of the Government of Ireland Act, 1920, and those of the Order in Council. The position after the Order in Council was as follows: as respects Irish services (which include the levying of estate duty), His Majesty's executive power (thus including the power of levying estate duty in Northern Ireland) is exercisable by the officers of the government of Northern Ireland, while His Majesty's executive power of levying estate duty in England remains, as before, exercisable by the English revenue authorities, and there is a corresponding division in the Exchequer and Consolidated Fund (see sects. 8 and 20 of the Act of 1920). The levying of death duties in England remains governed by the relevant statutes in force before the Act of 1920 became operative, and is subject to future regulations by the Parliament of the United Kingdom. The levying of death duties in Ireland is governed by the Acts which, up to the operative date, had prevailed in Northern Ireland, as also in Great Britain, but are for this purpose thereafter to be read as applying to Northern Ireland, and no longer to the United Kingdom generally, and is subject to future regulation by the Parliament of Northern Ireland (see sect. 61 of the Act of 1920). This scheme is worked out by the Order in Council which derives its statutory efficacy from sect. 69 of the Act of 1920. The details of the working out of this scheme are intricate, but no question of doubtful construction was raised upon it before me, and the result of the legislation, so far as material to the present case, seems to be clear.

On July 27, 1923, John Campbell White died. In respect of his death, the proper officers of the Crown in Northern Ireland, exercising, in accordance with the Government of Ireland Act, 1920, s. 8, the executive power in that behalf vested in His Majesty the King, levied estate duty upon the appropriate parts of the estate of the testator under the provisions of the Finance Act, 1894, as subsequently modified by various provisions, including the Finance Act, 1914. The Act of 1894, as so modified by statutory provisions coming into force before Dec. 23, 1920, continued, as I have already indicated, to be operative in Northern Ireland by virtue of the Government of Ireland Act, 1920, s. 61, subject to various modifying provisions to be found in the Government of Ireland (Adaptation of Taxing Acts) Order, 1922. The testator at the date of his death was domiciled in Northern Ireland, and had no property in Great Britain except personal estate of the value of £66, and, in view of the fact that that personal estate was of less value than £100, no estate duty became leviable by the officers of the Crown in Great Britain under the executive authority conferred on His Majesty the King by the Finance Act, 1894, as subsequently modified.

On Feb. 5, 1936, the testator's widow died. Immediately before her death, the estate of the testator charged by his will and codicil to secure her life annuity consisted in part of investments locally situate in England, in part of investments locally situate in Northern Ireland, and in part of an interest in certain unrealised residuary personal estate of a brother of the testator situate in the United States of America. Thereupon a claim was put forward by the proper officers of the Crown in England, acting under the executive authority vested in His Majesty the King by the Finance Act, 1894, as subsequently modified, for duty in respect of the English investments last-mentioned, on the allegation that such duty was payable on property passing on the death of the widow, because, by virtue of the Finance Act, 1894, s. 2 (1) (*b*), property passing on the death of the widow is to be deemed to include property in which the widow had an interest ceasing on her death. Having regard to the decision in *A.-G.* v. *Watson* (1), it is now settled law that an annuitant such as the widow was in this case has an interest ceasing on her death in the property upon which the annuity is secured. It follows, in my view, that the claim of the English revenue authorities was correctly made that estate duty was leviable upon the widow's death upon the principal value of the investments in question to the extent to which a benefit accrued or arose by the cesser of the widow's interest (see the Finance Act, 1894, s. 2 (1) (*b*)), such extent to be quantified by the process of valuation indicated in sect. 7 (7) of the Act.

In view of the fact that the annuity is charged by the will and codicil, not only upon the investments now in question, but also on other property forming part of the testator's estate, it is obvious, and this was not questioned, that, in measuring the extent of the property in respect of which the duty is leviable by the English revenue authorities, the annuity must be treated as charged proportionately upon the various items of property constituting the residuary estate. An answer suggested to this claim was that the widow had no interest in the investments in question, but had an interest only in a chose in action, consisting of the right of the residuary legatees to sue in the proper forum of administration (which it was suggested was Northern Ireland), to enforce against the executors a claim for the proper administration of the residuary estate, and it was accordingly suggested that the property in which the widow had an interest was property situate out of Great Britain, and it was, I think, admitted that, if the property in which she had an interest is to be taken to be property out of Great Britain, estate duty would not now be leviable on it by the English revenue authorities, in view of the provisions of sect. 2 (2) of the Act, coupled with the relevant provisions of the Government of Ireland Act, 1920, and of the succeeding Orders in Council.

This contention put forward against the Crown's claim in my judgment breaks down, because the suggested analysis of the legal position is erroneous. The widow had in respect of her annuity a charge, not on the right of the residuary legatees to sue the executors, but on the property which constituted the residuary estate, and, if that be the true view, the claim of the English revenue authorities must so far succeed in respect of the investments in question—namely, those which form part of the residuary estate, and are in fact admittedly locally situate in Great Britain.

It was next argued on behalf of the executors that, in view of the A
provisions of the Finance Act, 1894, s. 5 (2), as modified by the Finance Act, 1914, s. 14, they were protected against part, at least, of the claim, by reason of the fact that estate duty had already been paid in respect of some part, at least, of the property represented by the investments in question since the testator's death, and it was admitted, as I under- B
stood, that this contention would be sound if such estate duty had in fact been paid. It was, however, pointed out on behalf of the Crown that this contention could succeed only if the estate duty already paid (which was, of course, estate duty levied in Northern Ireland under the legislative provisions applicable in Northern Ireland at the date of the C
testator's death) was comprised in the expression "estate duty" in the Finance Act, 1894, s. 5 (2), as such Act was operative in Great Britain at the date of the widow's death. In my view, the phrase "estate duty" in this section means estate duty levied or leviable in virtue of His Majesty's executive powers at a date between the coming into operation D
of the Finance Act, 1894, and Dec. 22, 1921 (when the financial provisions of the Government of Ireland Act, 1920, became operative), but, as regards estate duty levied or leviable after Dec. 22, 1921, the phrase "estate duty" in the Act of 1894, in so far as it is operative in Great Britain, comprises estate duty levied or leviable in virtue of His Majesty's execu- E
tive powers exercisable in England, but cannot and does not comprise estate duty levied or leviable in virtue of those executive powers of His Majesty which are delegated by him, by virtue of the Government of Ireland Act, 1920, to the executive officers of the Crown acting in Northern Ireland, and are exercised under the authority of statutes which are F
operative in Northern Ireland only in relation to Northern Ireland, and subject to the regulation of the legislature of Northern Ireland. In other words, the estate duty levied in Great Britain since the coming into operation of the financial provisions of the Government of Ireland Act, 1920, is a different duty from the duty levied in Northern Ireland G
since the coming into operation of those financial provisions, and the expression "estate duty" in the Finance Act, 1894, s. 5 (2), must, for all purposes relevant to the present claim, be confined to duty levied under the executive powers of His Majesty in Great Britain. This result seems necessarily to follow if the abstract which I have set out above of the H
operation of the Government of Ireland Act, 1920, and the subsequent Order in Council be correct. It was pointed out that this view of the operation of the Government of Ireland Act, 1920, is the only view consistent with the provisions of sect. 28 of that Act, which plainly envisage the existence of two separate and possibly overlapping duties, and

further that, on any other view, neither sect. 4 nor sect. 7 (10) of the Act of 1894 could have effect without producing anomalous results. For the reasons I have thus indicated, the executors are not, in my judgment, entitled to any remission of duty by reason of the operation of sect. 5 (2) of the Act.

I may add that the correctness of this view of the operation, in the circumstances, of sect. 5 (2) of the Act appears to be confirmed by the provisions of the Finance Act, 1936, s. 25, which seems quite clearly to proceed upon the view of the operation (in such circumstances as those of the present case) of sect. 5 (2) which I hold to be the correct view, and it may well be that, having regard to the principles laid down in *A.-G.* v. *Clarkson* (2), the existence of this latter statute would alone be conclusive upon the point.

I shall accordingly declare that, on the death of the widow, estate duty became payable in England in respect of the investments in England held by the plaintiffs as part of the testator's estate at the date of the widow's death, such duty to be assessed under the Finance Act, 1894, s. 2 (2), and in accordance with the provisions of sect. 7 (7) of the same Act, in respect of so much of the annuity as is properly apportionable to the said investments. The plaintiffs must be ordered to pay the costs of the Attorney-General.

Solicitors: *Russell & Arnholz*, agents for *White, McMillan & Wheeler*, Belfast (for the applicants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

CROSS *v.* BRITISH OAK INSURANCE CO., LTD.

[KING'S BENCH DIVISION (du Parcq, J.), **January 11, 1938.**]

Insurance—Motor insurance—Actions against insured—Duty of insurers to satisfy judgments—Notice of proceedings—"Commencement of proceedings"—Road Traffic Act, 1934 (*c.* 50), *s.* 10 (2) (*a*).

F. was the driver of a motor vehicle who was insured against third-party risks with the defendant company. As a result of an accident, B. sued F. for damages for personal injuries. F., alleging that the injuries were the result of the negligence of one C., joined C. as a third party, claiming against C. an indemnity or contribution. On Mar. 24, 1937, being more than 7 days after the commencement of these proceedings, notice was given to the defendant company that F. had been given leave to bring in C. as a third party. Subsequently, C. counterclaimed for damages for personal injuries by reason of the negligence of F. No notice of the counterclaim was given to the defendant company. F. was unsuccessful in the action, and on the counterclaim C. was awarded £90 damages, and recovered costs both on the claim against him as a third party and on his counterclaim. C. then brought this action against the defendant company under the Road Traffic Act, 1934, s. 10, claiming the damages and costs obtained by C. against F., and the defendant company relied upon the defence that they had not received notice of the proceedings in which judgment was given before or within 7 days after the commencement of those proceedings:—

Held: (i) so far as concerned the judgment for damages, the proceedings commenced with the counterclaim, and, as C. had given no notice of that claim to the defendant company, he was not entitled to recover in respect of damages.

(ii) as regards the claim for costs, as the proceedings commenced with the third-party order, a proper notice was given, but, upon the construction of the policy, F. had no claim against the company in this respect. A

[**EDITORIAL NOTE.** Under the Road Traffic Act, 1934, s. 10 (2) (*a*), an insurer is not liable to satisfy a judgment obtained against the insured unless he has been given notice of the bringing of the proceedings before or within 7 days after the commencement of the proceedings. B As this part of the subsection is drafted, it merely envisages the insured being the defendant in an action between two parties only, and it ignores the possibility of the insured being the defendant on a counterclaim, and still more the position that arises in third-party procedure. The question for decision here is what is the commencement of the proceedings when a third party counterclaims against the original defendant, and it is held to be the date C of the counterclaim.

As to Qualifications of the Duty of Insurers to Satisfy Judgments, see HALSBURY, Hailsham Edn., Vol. 18, pp. 564, 565, para. 914; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217ee, 3217ff.]

Action for a declaration that the defendants are liable to pay to the D plaintiff the sum of £118 9*s*. 9*d*., being the amount of the judgment and costs obtained by the plaintiff against one Kenneth Fowler in the Birmingham County Court, and for the relief consequent on such a declaration.

Graham Rogers for the plaintiff.

H. I. P. Hallett, K.C., and *Stephen Chapman* for the defendants. E

du Parcq, J.: This is one of those unfortunate cases in which the driver of a motor vehicle became involved in an accident, was found to be liable to other persons, was insured, apparently, as it was his duty to be insured, but in such circumstances that, rightly or wrongly—I F have nothing to do with that—the insurance company claimed to be entitled to repudiate the policy. The Road Traffic Act, 1934, does something to assist people who are injured by reason of the negligence of the insured in such circumstances, and what I have to decide in this case is the meaning and effect of the Road Traffic Act, 1934, s. 10. G

The history of the matter is this. On Jan. 7, 1936, there was an accident in which three parties were involved. One of the three persons involved, either himself or by his servant, it matters not which, was Mr. Fowler, the insured, and the result was that an action was brought by one of the people injured, a Mr. Baker, who said that he had been injured by H negligence for which Fowler was responsible. Baker brought his action in the Birmingham County Court. Apparently, in addition to running into Baker, Fowler or his servant had run into a man named Cross, and Fowler said that the whole thing was the fault of Cross, and that it was not his fault. The result was that Fowler was advised to apply

to the county court for leave to join Cross as a third party, claiming against Cross indemnity or contribution. On Mar. 24, 1937, the Birmingham County Court by an order made by the registrar gave leave to Fowler to issue and serve a third-party notice on Cross, and on Mar. 24 a firm of solicitors wrote a letter to the defendant company,
A the British Oak Insurance Co., the defendants in this action, in which they quite clearly gave them notice that an order had been made in the county court action, giving leave to Fowler to bring in Cross as a third party. Subsequently, Cross, having been brought in as a third party, counterclaimed, as he was entitled to do, against Fowler, claiming that
B he had been injured by reason of Fowler's negligence. No notice of that was given by anybody to the company, who are the defendants in this action. Whether they knew it or not I do not know, but, at any rate, they had no notice of it. All they had notice of was that a third party notice had been issued, or was to be issued, and served against
C Cross.

The result of the hearing before the judge in the county court was that Fowler was unsuccessful both as defendant to the claim made by Baker and as plaintiff against Cross, and, what is more, Cross was successful against Fowler on Cross's counterclaim, and he recovered £90 by way
D of damages, and recovered costs both on the claim against him as third party and on his counterclaim. Whether Mr. Fowler is in a position to pay this sum or not I do not know, and I need not stop to inquire, for in this action the plaintiff, Mr. Cross, says that he is entitled to recover it against the insurance company—the defendant company—
E by reason of the provisions of the Road Traffic Act, 1934, s. 10. Under sect. 10 (1), he says that he is entitled to bring this action, because he has obtained a judgment in respect of a liability required to be covered by a policy, and which was in fact covered by the terms of the policy, against the person—namely, Fowler—who was insured by the policy.
F Then he says that it matters not that the insurer, the defendant company, may be entitled to avoid or cancel the policy, for they have avoided or cancelled the policy. That is subject to the provisions of the section, and the defendant company rely on the provisions contained in sect. 10 (2), which is in these words:

G

> No sum shall be payable by an insurer under the foregoing provisions of this section (*a*) in respect of any judgment, unless before or within 7 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings . . .

When one reads the other subsection to which I shall have to refer,
H subsect. (3), it is difficult to resist the conclusion that the result of the way in which the Act has been drafted is that it does not appear by any means to deal with all the contingencies which may arise. Perhaps I should say that the Act seems to have been drafted, or at any rate finally passed, in a form which would lead one to suppose that those responsible for it had not envisaged some of the events which were not

only likely, but also certain to happen, and were legislating either in ignorance or in forgetfulness of the procedure in the courts of this country. That is unfortunate. It makes the position of insurance companies difficult, as well as the position of the insured, and it does not make the task of the judge particularly easy.

When were the proceedings commenced? One might say: "The proceedings in which the judgment was given were commenced when Baker began his action in the county court. That was the commencement of the proceedings. Ultimately, the third party is brought in; a judgment is given in his favour in those proceedings which Baker began when he issued a plaint." Or one may say that that cannot be what the Act means, but that the proceedings in which the judgment was given began when Cross was brought in as a third party, because, when he was brought in as a third party, it was for the first time possible for any judgment to be given which would affect his rights. When once he was brought in as a third party, it was, at any rate, possible that he would counterclaim, and anyone receiving notice that Cross was a third party, and studying, as he should, the procedure of the county court, would know that there might be a counterclaim by Cross. Thirdly, it may be said, and has been said here, that that is not when the proceedings in which judgment was given began. Judgment is given on the claim brought by Cross against Fowler, and it is when Cross first makes the claim against Fowler that the proceedings commence in which that judgment is given. I do not think that great assistance is to be obtained from earlier cases dealing with other sections of other Acts of Parliament. I think that I ought to deal with this case rather by considering this Act of Parliament, while, of course, keeping in mind the result of earlier decisions, and certainly, of course, not coming to any conclusion which would be inconsistent with any earlier decision. I think that I can put aside at once the first of the possible views to which I refer. It is of great importance to the person who ultimately recovers judgment that he should be able to recover against the insurers, and, though he is not obliged to give the notice himself, he may give it. In this case, it would have been quite impossible for Mr. Cross to take any step with a view to giving notice of his claim within 7 days after the commencement of the proceedings, if by the word "proceedings" is meant the action instituted by Baker. The real question which I have to decide, as is agreed by counsel in the case, is whether the second or third of the meanings which I have stated is to be given to these words. If sect. 10 (2) stood alone, I should certainly be disposed to think that the view contended for by Mr. Rogers was the right view, because I think that it might well be said that the proceedings in which this judgment was given were taken when Cross was made a third party. From that moment, he had the right to counterclaim, and, although, no doubt, there is ample authority for the proposition that a counterclaim is for most purposes to be regarded as a cross-action, and a separate proceeding in that sense, still I should have thought, looking only at subsect. (2), that it was enough if notice were given of the commencement of the third party proceedings. But Mr. Hallett has pointed out the difficulty which faces the court in trying to put such a construction on subsect. (2) by reason of the provisions of subsect. (3).

The scheme of the Act is this. The mere fact that the insurer can escape his liability *vis-à-vis* the insured by reason of something which entitles the insurer to avoid or cancel the policy does not prevent the person injured by the tort of the insured from recovering against the insurers, but the insurers can take steps which will protect themselves. The insurers may obtain a declaration that they are entitled under sect. 10 (3) to avoid the policy in certain cases where it was obtained by the "non-disclosure of a material fact, or by a representation of fact which was false in some material particular," but, if that declaration is to avail the insurer, he must obtain it "in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given." Those are exactly the same words as appear in subsect. (2) (*a*), "the proceedings in which the judgment was given." Even if he gets such a declaration, the insurer is not

> . . . entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action [the action for declaration], unless before or within 7 days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto.

That is to say, to the action for a declaration. That is the proviso to sect. 10 (3).

Let it be assumed, in order to test this question, that the proceedings in which the judgment was given are the proceedings begun by the service of the third-party notice, which would mean that, in this case, a proper notice had been given by the plaintiff. Let that be assumed. That would mean that the insurer, to maintain his rights, would have to begin his action within three months after the third-party notice was issued, and it is to be observed that it might well be, certainly so far as the High Court is concerned, and possibly so far as the county court is concerned, that more than three months would go by after the issue of the writ in an action before there were any third-party proceedings at all. Certainly, if the long vacation intervened, that might happen.

In fact, the proceedings were commenced by the issue of a writ, I suppose, and the writ might not be served for a long time. That makes one think that Parliament cannot have intended the words "proceedings in which the judgment was given" to refer to the issue of the writ in a case not complicated by third-party proceedings, or the service of third-party proceedings in a case where there are third-party proceedings. The principle is exactly the same in each case, if one regards the third-party proceedings as analogous to the issue of the writ. Then, of course, the counterclaim by the third party is analogous to the counterclaim by the defendant. It really does, therefore, seem to reduce to an absurdity the proposition which, under subsect. (2), I should have thought probably right, because in this particular case—to use the name of a party in the case—it might well be that it would be impossible for the insurers to give a notice to Mr. Cross in the time which is provided by the proviso. Supposing that he had begun his action within three months after the commencement of the proceedings, in the sense of the issue of the third-party notice, it would not follow that he would be in a position to give the requisite notice. Further, the proviso uses these words, on which great stress has properly been laid: "to the person who is the plaintiff in the said proceedings." They are not very happily-chosen words. It is necesary to construe them as meaning "the person who is making a claim in the said proceedings, which results, or may result, in judgment against the insured person—the insured." The proviso that, within 7 days after the commencement of an action, notice shall be given to the person who is the plaintiff in the proceedings, construed literally again, is absurd, because that would mean that the insurer who was proposing to repudiate the policy, when his insured issued a writ must at once inform him that he, the insurer, had obtained a declaration that he was entitled to repudiate the policy, which, of course, the plaintiff would know perfectly well already. It must mean "the defendant who counterclaims." The defendant who counterclaims must be covered by those words "the plaintiff." He cannot be covered by those words "the plaintiff," or become a plaintiff in any sense, until he has counterclaimed. That view, to which one is forced, seems to me to lend great colour to the argument that the proceedings are taken to be commenced by the counterclaim, because the legislature seems to have thought of the person who makes the claim as commencing the proceedings. So much so that they actually call him the plaintiff, although technically he may not be the plaintiff at all, but a defendant counterclaiming. It seems to me, therefore, that subsect. (3) gives the strongest indication that "the proceedings in which the judgment was given" means "the proceedings begun by a person who may for this purpose be regarded as the plaintiff, resulting in the judgment upon which reliance is placed as against the insurers." If that is right, the plaintiff here cannot succeed. Certainly he cannot succeed as to the major part of his claim.

There is the further question as to whether the plaintiff can succeed so far as concerns the costs that Fowler became liable to pay, as a result of the third-party proceedings, and not the counterclaim, because there a notice was given. I think that the answer to that is that under the policy Fowler had no claim in respect of that. The suggestion there is that Fowler is entitled to call upon the company to indemnify him, because he chose to make a claim in respect of this accident against somebody who was under no liability to him. He brought it against a man who was involved in the accident, though not to blame. He might have brought it against anybody else. I do not think that his liability to pay that person's costs is covered by the words:

> The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of: death of or bodily injury to any
> A person caused by or arising out of the use of any vehicle . . .

It does appear that the matter is dealt with rather by the words: "The company will pay all costs and expenses incurred with its written consent." It is unnecessary to say that there was no written consent here.

B The result is that, though I do not think that I can say that the matter is entirely free from doubt, I think it is reasonably clear that, in the absence of any notice to the insurance company that Cross was making a claim, the insurance company have a good answer, or, to put it more accurately, the plaintiff has not established the facts which he must
C establish in order to succeed against them. Within the meaning of sect. 10, the proceedings in which the judgment was given were commenced, in my view, when Cross counterclaimed, and not before, and there must be judgment for the defendants.

Judgment for the defendants, with costs.

D Solicitors: *Emmet & Co.*, agents for *Wragge & Co*, Birmingham (for the plaintiff); *L. Bingham & Co.* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

E *Re* BECKERMET MINING CO., LTD.'S APPLICATION.

[Railway and Canal Commission (Finlay, J., Sir Francis Taylor, K.C., Sir Francis Dunnell), **January 20, 21, 24, 1938.**]

Mines—Application to search for and get ore—Grant subject to compensation of owners—No grant of compensation for apprehended damage.

F The applicants applied for an order that they might search for and get iron ore over a large area, which was very little proved, and under some parts of which there might be no ore. The surface owners asked that they might receive compensation, not as and when damage was done by letting down the surface, but in respect of the apprehension that the surface might be so let down:—

G Held: compensation could not be awarded until the surface was actually let down, and the principle applied to damages in *Backhouse* v. *Bonomi* (1) applies to a grant of compensation.

[EDITORIAL NOTE. It is well-settled that there can be no claim for damages for letting down the surface by mining operations until actual damage has been sustained, and this principle is here extended to a grant of compensation for the
H letting down of the surface of land by mining operations.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 1, pp. 12, 13, para. 13; and for Cases, see DIGEST, Vol. 1, p. 29, Nos. 231, 232.]

Cases referred to:

(1) *Backhouse* v. *Bonomi* (1861), 9 H.L. Cas. 503; 17 Digest 90, *78*; 34 L.J.Q.B. 181; 4 L.T. 754; *affg.* S.C. (1859), E.B. & E. 646.

(2) *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.*, [1908] A.C. 27; 17 Digest 91, *85*; 77 L.J.Ch. 102; 98 L.T. 4; *revsg.* S.C., [1906] 2 Ch. 22.

APPLICATION by the Beckermet Mining Co., Ltd. to search for and get iron ore in an area in Cumberland. The iron ore had been apparently very little proved over the area, but at one place, under a farm and fields called Sheepfields Farm, iron ore had been found in considerable quantities, and there might be scattered pockets of iron ore over parts of the somewhat large area which was involved. There were numerous owners, and in some cases the titles were uncertain and the subject of dispute. There was no opposition to the grant, but considerable dispute as to the terms of it.

H. V. Rabagliati, K.C., *P. G. Roberts* and *R. L. A. Hankey* for the applicant company.

David Bowen for Ronsley Miles Ponsonby, lord of the manor of Haile and Wilton.

Maurice FitzGerald for the Lowther Estates, the Thompson Trustees, J. W. Dawson, W. Jackson and Col. Burns-Lindow.

R. F. G. Ormrod for the Walker Trustees.

Hon. T. G. Roche for the Ecclesiastical Commissioners.

FINLAY, J.: The matters which the court has to decide in this case are simple. There can, in the circumstances, be no doubt that Part I of the Act has been complied with, and there can be no doubt that it is expedient in the national interest that this ore should be worked. It is not necessary to go into that in detail, but, from the point of view of employment (and it might be put in other ways), it seems to us clear that the proving and the working of this ore is in the national interest. Nobody is concerned to dispute that the Beckermet Mining Co., Ltd., are the only people who are at all likely to undertake this work. Holding, as we do hold, that the provisions of Part I have been complied with, and holding that sect. 4 is applicable—it might be put on more than one ground, but probably sect. 4 (1) (*a*) is sufficient—and holding that the national interest renders it expedient that this ore should be worked, that really decides the main point which is before us, and the point which, whatever else may be in dispute, was not really in dispute at all.

That brings me to the only question, as I say, which can possibly be regarded as a question of principle. It was argued with regard to the surface owners that they ought to receive compensation, not, as is usually the case, as and when damage was done by the letting down of their land, but in respect of what one may call the apprehension that their land might be let down. The first thing to be said about that is that never in the history of this court has an award of compensation on that principle been approved, and the difficulties which would arise are perfectly obvious. They are illustrated by this very case. Here is a very large area, it is practically agreed that under a large part of it probably there is no ore at all, and it would be very difficult to say that at once and with regard to all of it compensation is now to be granted. Ultimately, counsel who argued this case said that he would not contend for that. But it is difficult to see, if the principle is right, why it should not apply, and the fact that it was recognised that it must be limited, and limited to areas where the company had intimated that they had found, or had thought that they were going to find, ore strongly suggests that there is something wrong with the principle. Indeed there is, as I think, something wrong about the principle. It conflicts, to my mind, with a series of decisions of the very highest authority. It is not necessary to go back to the famous case of *Backhouse* v. *Bonomi* (1), and there are several other cases which follow it. It is sufficient to refer to one case in the House of Lords, the case of *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.* (2). If the various opinions given by the Lords, particularly, perhaps, that of LORD MACNAGHTEN, are looked at in that case, it seems to me to make it quite clear (and indeed this was conceded by Mr. Fitzgerald) that there was no legal claim at all in the surface owner. The reason can be seen in the opinion of LORD MACNAGHTEN, and in several of the other opinions too, and it really rests on a principle which had been well settled at least as far back as *Backhouse* v. *Bonomi* (1). The principle which led the House of Lords in these cases to the conclusion that there is no cause of action unless and until actual damage results applies, we think, to the grant of compensation in a case such as the present. Our duty here is to grant compensation, and to make such order as is proper with regard to compensation, and that depends upon sect. 9 (2) of the Act of 1923. The principle which led the House of Lords in several cases to decide that there was no legal right to claim unless and until damage arose ought, I think, now that the matter has been raised, to lead the commission to take the view that, for the purpose of sect. 9 also, we cannot give effect to the suggestion that compensation ought to be allowed before the damage has been done. If and when land is let down, the person entitled will, of course, become entitled to full compensation. He is entitled to that, and, in our opinion, he is entitled to no more. It will probably be sufficient to say that this claim is a completely novel claim. It was certainly suggested that there was something wrong with it, but, as it was fully argued, and out of respect for the argument of Mr. Fitzgerald, we have thought it right to deal with it, and our conclusion is that it cannot be sustained. That really, I think, exhausts the points with which it is necessary that we should deal. There may be some difficulty in working out some parts of the order, but I think that, after what we have said, and having regard to one or two intimations which were made in the course of the hearing—I may refer particularly to one thing which we did in saying that applications with regard to compensation in some cases might properly be made by letter, and that thereupon this commission would direct a local inquiry and other matters of that sort—

this judgment deals fully with all the matters that have arisen in this court, and, if any difficulty arises, the assistance of the commissioners will be given in order that it may be settled. For these reasons, our order is that this application be granted.

Sir Francis Taylor: I agree, and have nothing I wish to add.

Sir Francis Dunnell: I agree.

Application granted.

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, agents for *Brown, Auld & Brown*, Whitehaven (for the applicant company); *Minet, Pering Smith & Co.*, agents for *Brockbank, Helder & Ormrod*, Whitehaven (for Ronsley Miles Ponsonby, lord of the manor of Haile and Wilton); *Ellis & Ellis*, agents for *Howson Dickinson & Mason*, Whitehaven (for the Lowther Estates, the Thompson Trustees, J. W. Dawson, W. Jackson, and Col. Burns-Lindow); *Brockbank, Helder & Ormrod*, Whitehaven (for the Walker Trustees); *Milles, Jennings White & Foster* (for the Ecclesiastical Commissioners).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* PAGET, PAGET *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Sir Wilfrid Greene, M.R., Lord Romer and MacKinnon, L.J.), **December 1, 2, 3, 1937, January 31, 1938.**]

Income Tax—Interest from securities—Foreign bonds—Sale of interest coupons—Liability of proceeds to tax.

(i) P. was the holder of 4½ per cent. bearer bonds of the city of Budapest. By the terms of the bonds interest coupons attached thereto were payable in London in sterling and in certain other countries. By a decree of the Hungarian government, the municipality of Budapest was directed to deposit with the Hungarian National Bank, as the payments of interest fell due, the equivalent in pengos of the sum owed. A foreign creditors' fund was formed into which the payment of the pengos was made. Further, by the decree, payment of interest coupons could be obtained in Hungary in pengos, but only with the sanction of the Hungarian National Bank for actual use in Hungary. P. sold the interest coupons as each fell due for payment, the agent or coupon dealer through whom they were sold deducting income tax from the proceeds of sale. P. was assessed to sur-tax upon the proceeds of sale:—

Held: the deposit of pengos in the Hungarian National Bank could not be regarded as a payment of interest to P., the bank being in no sense the agent of P. to receive money on P.'s behalf. The proceeds of sale of the interest coupons were therefore not income arising from the value of securities, and were not liable to tax.

(ii) P. was also the holder of 7 per cent. bearer bonds of the kingdom of Jugoslavia, the interest coupons attached thereto being payable in American dollars in New York. In 1933 the Jugoslav government expressed its inability to pay interest on the bonds in full and put before the holders of the bonds a scheme for meeting the coupons maturing from Nov. 1, 1932, to May 1, 1935. The suggested scheme was that there should be payment of each coupon in dinars in Belgrade, the disposal and use of the dinars to be governed by the general provisions of the kingdom of Jugoslavia, the alternative being a payment of 10 per cent. of the face value of such coupons in American dollars, and the issue of funding bonds for the balance of such value. P. sold the interest coupons, the agents or coupon dealers deducting income A tax from the proceeds of sale. P. was assessed to sur-tax upon the proceeds of sale:—

Held: as P. had not accepted the Jugoslav government's offer, no interest was paid to or accepted by P., and there was no receipt of interest by P. which was liable to tax.

Decision of Finlay, J. ([1937] 3 All E.R. 890) *affirmed.*

B [**EDITORIAL NOTE.** Upon a sale of interest coupons it must be taken that the purchaser will discount the possibility of the interest not being paid, and also the liability of the interest when received to tax. The proceeds of sale of such coupons are not, therefore, interest in the hands of the seller.

As to Interest, see HALSBURY, Hailsham Edn., Vol. 17, p. 179, para. 375; and for Cases, see DIGEST, Vol. 28, pp. 69-72, Nos. 368-380.]

C Appeal from a judgment of Finlay, J., given on July 30, 1937, and reported in [1937] 3 All E.R. 890. The facts are fully stated in the judgment of Sir Wilfrid Greene, M.R.

The Attorney-General (*Sir Donald Somervell, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the Inland Revenue Commissioners.

D *A. M. Latter, K.C.*, and *Frederick Grant* for the Hon. Dorothy Wyndham Paget.

Sir Wilfrid Greene, M.R.: These appeals relate to certain assessments to sur-tax made upon the respondent, Miss Paget, in respect of E the proceeds of sale of interest coupons sold by her in the circumstances hereinafter stated. The coupons in question were coupons for interest payable upon the bonds of two foreign loans which she held, and the facts relating to them are as follow: In regard to the city of Budapest loan, Miss Paget was the holder of certain 4½ per cent. bearer bonds F issued by the city of Budapest. Attached to the bonds were coupons for interest which fell due for payment on July 1 and Jan. 1 in every year. The coupons were payable in London in sterling, and in certain foreign countries in the appropriate currencies.

By a decree of the Hungarian government which came into force on G Dec. 23, 1931, for the period of one year, and was afterwards continued in force until Dec. 22, 1934, the city of Budapest was forbidden, while the decree remained in force, "but without prejudice to the full rights of the creditors after its expiry," to make payments of interest on the bonds direct to creditors, but was ordered to deposit equivalent sums H in pengos (taken at an official rate of exchange) with the Hungarian National Bank. The decree provided that these sums were to be paid into a special fund (called the foreign creditors' fund), to which alone coupons were to be presented for payment so long as the decree remained in force. The Hungarian National Bank, in agreement with its adviser, was to decide if, and to what degree, the coupons might be redeemed. After the decree came into force, payment of the coupons could be obtained in Hungary in pengos out of the foreign creditors' fund, with the prior sanction of the Hungarian National Bank, but only if the money was required for certain specified classes of expenditure in Hungary. A market existed in London for the sale of these interest coupons, and during the years ending Apr. 5, 1933, and Apr. 5, 1934, Miss Paget sold interest coupons belonging to her bonds, the gross amounts realised being £1,172 10*s.* in the former year and £1,554 7*s.* 8*d.* in the latter year. The sales were effected in each case after the due date for the interest payment, and the price received was considerably less than the face value of the coupons. The sales were made in London through agents or coupon dealers, who, to quote the stated case, "deducted income tax from the proceeds of sale on payment to Miss Paget." The meaning and effect of this finding by the special commissioners will be examined later in this judgment.

In regard to the Kingdom of Jugoslavia loan, Miss Paget was the holder of certain 7 per cent. bearer bonds issued by the Kingdom of Jugoslavia. Attached to the bonds were coupons for interest which fell due for payment on May 1 and Nov. 1 in every year. The coupons were payable in New York in United States dollars. On July 24, 1933, the government of Jugoslavia issued a circular letter stating that, in view of its inability to secure sufficient foreign exchange, it had been "obliged temporarily to interrupt service payments" on these and other bonds, and had decided to propose to the holders "certain temporary modifications." The letter stated that arrangements had been made to pay the six coupons maturing from Nov. 1, 1932, to May 1, 1935, both inclusive, by either of two methods at the holder's option—namely, by payment in dinars in Belgrade or by payment of 10 per cent. in dollars in New York, and the balance in 5 per cent. funding bonds due Nov. 1, 1956. In the case of payment in dinars, the use to which the dinars might be put was to be governed by regulations from time to time in force in Jugoslavia. The acceptance of payment in dinars or of the 10 per cent. payment in dollars and funding bonds (as the case might be) was to "constitute full payment" of the coupons exchanged. In Sept., 1933, Miss Paget sold the interest coupons belonging to her bonds which fell due for payment on Nov. 1, 1932, and May 1, 1933, the gross amount realised being $3,587.50, equivalent to £760 1*s.* 3*d.*, a sum considerably less than the face value of the coupons. The sales were made in London through agents and coupon dealers, who "deducted income tax from the proceeds of sale." The net sum was credited to Miss Paget's banking account in Montreal.

In assessments to sur-tax made upon Miss Paget for the years ending Apr. 5, 1933, and Apr. 5, 1934, respectively, there were included sums equal to the gross purchase price of the coupons which she had sold. It was sought to justify this assessment upon the ground that these sums were income in respect of which Miss Paget was liable to bear income tax either under Sched. C or under Case IV of Sched. D. In the course of the hearing before us, Mr. Hills stated that he proposed to rely on Case VI of Sched. D and the provisions as to discounts in Case III. To this proposal Mr. Latter, on behalf of the respondent, objected, upon the ground that no such contention had been raised below. We overruled the objection, but no argument was addressed to us by Mr. Hills in relation to either of these two alternatives, and Mr. Latter was accordingly not called upon to deal with them. I mention this incident in order to place it upon record. The special commissioners decided against Miss Paget in the matter of the Budapest loan, but in her favour in that of the Jugoslavian loan. Both sides appealed. FINLAY, J., allowed Miss Paget's appeal, and dismissed that of the Commissioners of Inland Revenue, who now appeal to this court with regard to both loans.

Before considering the questions which arise, it is essential to have a true view of the facts. Each of the debtors defaulted in the sense that, for the period of suspension of interest, it repudiated its obligations to pay interest in accordance with the provisions of the bonds, and endeavoured to substitute a different method of payment. If Miss Paget had received payment in pengos and dinars, there can be no question that she would have received taxable income. But she did not. It was scarcely suggested on behalf of the appellants—and the suggestion, in any case, is ill-founded—that the possibility offered to Miss Paget of obtaining this income was income in respect of which she became liable to tax. The mere offer of income in substitution for the contractual interest cannot be income, and the finding of the special commissioners, in the case of the Budapest loan, that the deposit of pengos "constituted performance by the municipality of its obligation to pay interest on the bonds" cannot be supported. Indeed, the appellants made no attempt to support it.

The appellants' argument throughout was based on the proposition that the purchase price paid for the bonds was taxable income of Miss Paget. For the purpose of this argument, it was irrelevant to inquire whether or not the coupon dealers or some purchaser from them actually obtained pengos or dinars. The appellants' argument would have been precisely the same if they had destroyed the coupons. Accordingly, the appellants made no attempt before the special commissioners to show receipt of anything from the debtors by the purchasers of the coupons, and there is, in consequence, no finding upon this point. Miss Paget can be assessed to sur-tax in respect of the sums in question only if they formed part of her income for income tax purposes. The first contention of the appellants was that the interest payable on the bonds was in each case payable out of "a public revenue" within the meaning of Sched. C; that the coupon dealers who purchased the coupons were, under para. 7 (*d*) of the second set of rules as to interest contained in Sched. C, "persons entrusted with the payment," and were bound to deduct tax out of the purchase price of the coupons and to pay it to the revenue on behalf of Miss Paget; that the finding of the special commissioners to the effect that the coupon dealers deducted income tax was correct in fact and in law; and that the gross purchase price was "profit arising" to Miss Paget "from interest" on the bonds, and formed part of her income chargeable under Sched. C accordingly. This argument cannot, in my opinion, in any event apply to the Budapest loan, since I am unable to agree with the proposition (which was but faintly advanced) that the interest on that loan is payable out of "public revenue." This argument therefore must be confined to the Jugoslavian loan.

It is clear, as I have already pointed out, that Miss Paget received no interest on her bonds, and the argument is based upon what is said to be the effect of the machinery provisions of Sched. C relating to purchases of coupons by coupon dealers., These provisions, which afford a good example of ill-considered legislation only too common in income tax matters, require, therefore, careful examination. The argument was throughout conducted upon the footing that the coupons were purchased by the coupon dealers from Miss Paget, although the findings of the special commissioners on this matter are ambiguous. Sched. C (General Rule 1 (*a*)) applies only to "interest payable in the United Kingdom." It therefore does not apply to the interest on the Jugoslavian loan, which was payable in New York; nor does it apply to the substituted interest offered by the defaulting debtors. In its original form, as applied to loans by foreign governments, Sched. C provided by the second set of rules as to interest for the normal case where interest is paid by a paying agent in this country. The paying agent is to pay the tax on behalf of the persons entitled to the interest. He is to make the necessary returns, and it is upon him alone that the assessment is to be made. He is to pay the tax "out of the moneys in his hands" (r. 3), and is entitled to remuneration based upon "the amount of the dividends paid from which tax has been deducted." But, in cases where payment of interest by means of coupons could be obtained out of, as well as within, the United Kingdom, this machinery was not adequate for its purpose. It was possible in such cases for the bondholder to obtain payment abroad through a bank or other agent, who presented the coupons and collected the interest on his behalf; or he could, if he pleased, sell his coupon to a coupon dealer, who would then collect the interest on his own behalf. Accordingly, provision was made for these cases by the Customs and Inland Revenue Act, 1885, s. 26, and is now embodied in r. 7 of the second set of rules as to interest under Sched. C. The relevant paragraph of that rule runs as follows:

> (7) The following persons that is to say . . . (*d*) Any dealer in coupons who purchases coupons for any dividends (save such as are payable in the United Kingdom only) otherwise than from a banker or person acting as a banker, or another dealer in coupons, shall be included as being persons intrusted with the payment of dividends within the meaning of these rules.

The only dividends (which expression, of course, includes interest) which Sched. C sets out to tax are dividends payable in the United Kingdom, including dividends which are payable either in the United Kingdom or elsewhere. The words in brackets confine the dividends, to which r. 7 (*d*) relates, to the case of dividends payable in the United Kingdom or elsewhere, for the obvious reason that, where they were payable exclusively in the United Kingdom, the original machinery was adequate.

The original interest in the case of the Jugoslavian loan and the substituted interest offered in the case of both loans were payable exclusively out of the United Kingdom, and, therefore, fall altogether outside the scope of Sched. C as defined in General Rule 1 (*a*). But it is said on behalf of the appellants that r. 7 has had the effect of bringing into charge under Sched. C any purchase money received in the United Kingdom on the sale of a coupon to a coupon dealer, notwithstanding the fact that the interest payable on the coupon is not payable in the United Kingdom, and that the effect of the rule is to treat the purchase money received from the coupon dealer as though it were the interest itself, thus imposing on the coupon dealer an obligation to deduct income tax from the purchase money. I am unable to accept the view that r. 7 (*d*) so extends the scope of the charge under Sched. C. The rules purport to deal only with the interest affected by the charging provisions of the schedule. They are described in the heading as "Rules as to interest, etc." These words clearly refer to the words in Sched. C, r. 1: "interest public annuities dividends and shares of annuities payable in the United Kingdom." It is no doubt true that, if the language used is sufficiently clear, a machinery provision may operate so as to enlarge the scope of a charge. But here there is no such language. On the contrary, the language used appears to me quite clearly to confine r. 7 (*d*) to interest, etc., payable (whether exclusively or not) in the United Kingdom. In other words, the provisions of r. 7 are merely machinery for collecting the tax on the subject-matter charged—namely, interest payable in the United Kingdom. They do not, in the case of a coupon which is sold, substitute the proceeds of sale as the taxable subject-matter, which is what the appellants here say.

It follows from what I have said that the finding of the commissioners as to "deduction" of income tax from the purchase price paid by the coupon dealers is incorrect in law if it is meant to imply that tax was deducted in accordance with Sched. C. The appellants' main argument, therefore, fails. But they claimed in the alternative that the purchase price of the coupons was "income arising from securities out of the United Kingdom," and was charged with income tax under Case IV of Sched. D. There are two subdivisions of this argument. The first is that the purchase price was taxable by deduction under Miscellaneous Rule 7, which applies to certain interest, etc., the rules of Sched. C already discussed. The second is that Miss Paget was directly assessable in respect of the purchase price. The latter of these two contentions can be disposed of quite shortly. The purchase price received by Miss Paget was not income arising from the bonds at all. It arose from contracts of sale and purchase, whereby Miss Paget sold whatever right she had to receive such income in the future, as well as her right to take what was offered by the defaulting debtors. It is, in my opinion, quite impossible to treat this as equivalent in any sense to "income arising from" the bonds. A further aspect of this argument can be more conveniently dealt with later. With regard to the former contention, it would be sufficient to say that, in my opinion, neither the municipality of Budapest nor the Kingdom of Jugoslavia is a "foreign company society adventure or concern" within the meaning of Miscellaneous Rule 7. But, even if they or either of them could be thought to fall within those words, r. 7 does not, in my opinion, produce the result claimed. By r. 7 (2):

> all the provisions of Sched. C relating to . . . dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person . . . for payment to any persons in the United Kingdom shall extend to the tax to be assessed and charged under this rule.

We are therefore thrown back to the rules under Sched. C, and the result is that a dealer in coupons, who purchases coupons for interest payable in respect of the securities of a foreign or colonial company, society, adventure, or concern, is a person entrusted with the payment of that interest within the meaning of the rules. The consequences of this are left by the legislature in great obscurity, although in the normal case, where there is no default, the machinery, so far as income tax is concerned, no doubt works in practice. The coupon dealer, being a "person entrusted with payment of dividends," must, under r. 3, "out of the moneys in his hands pay the tax on the dividends on behalf of the persons entitled thereto." Under r. 2, he, and he alone, is assessable to the tax. What, then, in the case of the coupon dealer, are "the moneys in his hands"? They cannot be the interest ultimately received from the debtor, since r. 7 (*d*) excludes from the definition of "persons entrusted with payment" a coupon dealer who purchases from another coupon dealer. These moneys, therefore, can apparently be only the purchase money which the first coupon dealer pays to the seller of the coupons. But in paying the tax out of the purchase money the coupon dealer is not paying tax on the purchase money, for this, as has already been pointed out, is not the subject-matter of the tax. He is paying the tax "on the dividends," and he is paying it "on behalf of the person entitled thereto," *scilicet* to the dividends. This introduces a further difficulty, since the person entitled to the dividends is not the seller but the buyer, or (proleptically) the person who ultimately receives payment of the interest from the debtor. In the normal case, where there is no default, and the coupon is accordingly worth its face value, the interest which is struck with tax is (apart from any question of discount) worth in the market its face value less tax. The first coupon dealer will accordingly pay for it only that sum less tax, for he is the person accountable to the revenue for the tax on the interest. If he then sells the coupon to a person who is proposing to obtain payment of the interest from the foreign debtor, he will require to be paid the face value of the coupon, for that is the amount which the purchaser will obtain from the debtor, and will be entitled to keep, without any liability to tax, since tax has already been paid. The effect, therefore, would be, in the case of a sale to a coupon dealer, to cast the burden of the tax on the original owner of the coupon, who, on the sale of the coupon, would receive only its face value less tax payable on that face value. This is exactly what happens whenever taxable income is sold, since the price which a purchaser will give will be diminished by the amount of the tax which he will have to bear. But this does not mean that the purchase price is the taxable subject-matter. Nor does it mean that the interest, if and when received, is to be deemed to be the income of the original seller. These considerations become of importance when the question of sur-tax arises, for it then becomes necessary to ascertain whether the seller has received "income arising from" his security under Case IV (or, if the case is a Sched. C case, "profits arising from interest, etc., payable in the United Kingdom out of any public revenue"). I have already stated that, in my opinion, Miss Paget did not receive such income.

But it is said, on behalf of the appellants, that this view would lead to the result that, in the case of a sale to a coupon dealer, the interest would not as such be assessable to sur-tax, since it would form merely one item in the aggregate receipts of his business. This argument does not impress me. It is not difficult to think of cases where income which, if received by A., would attract sur-tax, escapes tax if transferred to B. The sale by A., a sur-tax payer, of an annuity belonging to him to B., who is not a sur-tax payer, is an obvious example. A similar argument was advanced in support of the proposition already discussed, that, quite apart from Miscellaneous Rule 7, the purchase price was income of Miss Paget taxable under Case IV of Sched. D. It was said that this proposition must be correct, since otherwise, if a coupon were sold to a person other than a coupon dealer and the interest were collected by him, that interest would escape income tax altogether. Even if this consequence were to follow on such a sale, I should not accept the conclusion based upon it. But, in my opinion, it would not follow, for I am unable to see how the purchaser of the coupon could successfully contend that the interest received upon it was not income in his hands. It was not seriously disputed by the Attorney-General that, if a number of coupons were cut off and sold together to a purchaser, the interest on each coupon as received would be income in the purchaser's hands. I am quite unable to see how the position can be different if one coupon only is sold, and no satisfactory reason for the distinction was suggested.

In the result, I am in agreement with the conclusions of FINLAY, J., and these appeals must be dismissed with costs.

Lord Romer [read by MacKinnon, L.J.]: During the years of assessment ending Apr. 5, 1933, and Apr. 5, 1934, respectively, the respondent, Miss Paget, was the holder of certain bearer bonds issued by the city of Budapest, with interest coupons falling due for payment on July 1 and Jan. 1 in every year. By reason of a decree of the Hungarian government, the coupons for interest falling due after Jan. 1, 1932, were payable in Hungary only, and then only with the consent of the National Hungarian Bank. In these circumstances, Miss Paget, instead of cashing the four coupons falling due during the two years of assessment, caused them to be sold through agents or coupon dealers in London. The gross proceeds of sale (including the proceeds of the unpaid part of the coupon falling due Jan. 1, 1932, also sold during the years of assessment) amounted to £1,172 10*s.* in the year ending Apr. 5, 1933, and £1,554 7*s.* 8*d.* in the year ending Apr. 5, 1934. In each case, the agents or coupon dealers deducted income tax from the proceeds of sale on payment to Miss Paget. During the year of assessment ending Apr. 5, 1934, Miss Paget was also the holder of certain bearer bonds of the Kingdom of Jugoslavia, with interest coupons falling due for payment on May 1 and Nov. 1 in every year. The coupons were normally payable in New York in American dollars. The government of Jugoslavia, however, having expressed its inability to pay the interest on the bonds in full, offered the bondholders the option of having the coupons maturing between Nov. 1, 1932, and May 1, 1935, met in one of two ways. The two alternative methods of meeting the coupons in question need not be particularised. It is sufficient to say that neither of them involved a payment in the United Kingdom. Miss Paget did not avail herself of the option thus offered to her, but, in Sept., 1933, sold the coupons falling due for payment on Nov. 1, 1932, and May 1, 1933, through agents or coupon dealers in London. The gross proceeds of this sale amounted to £760 1*s.* 3*d.*, but the coupon dealers deducted income tax and credited only the net sum to Miss Paget's banking account.

The question now to be determined is whether the gross sums received by Miss Paget during the year ending Apr. 5, 1933, from the sale of coupons of the city of Budapest bonds, and the gross sums received by her during the year ending Apr. 5, 1934, from the sale of coupons of those bonds and the sale of coupons of the bonds of Jugoslavia respectively, form part of her total income from all sources for those two years, so as to render her liable to be assessed for sur-tax in respect of them. The special commissioners decided this question in favour of the Crown in relation to the Budapest bonds and in favour of Miss Paget in relation to the Jugoslavia bonds. An appeal by the Crown and a cross-appeal by Miss Paget were taken to Finlay, J., who decided both in favour of Miss Paget. From his decision an appeal to this court has been brought by the Crown in both cases, and these appeals now fall to be determined.

It is plain that the Crown can succeed only if the gross proceeds of sale formed part of Miss Paget's income properly chargeable to income tax. The fact that tax was deducted from those proceeds by the coupon dealers to whom the coupons were sold is immaterial if such deduction was not properly made, even if the dealers accounted to the Crown for the sums so deducted. Whether or not they did so account does not appear. It was contended before us, on behalf of the Crown, that the gross proceeds formed part of Miss Paget's income, and that they were taxable either under Sched. C or under the Income Tax Act, 1918, Sched. D, Case IV.

I will deal first with Sched. C. The Act provides as follows:

> Tax under Sched. C shall be charged in respect of all profits arising from interest . . . payable out of any public revenue . . .

To what extent, if at all, the coupons of either of the bonds were payable out of public revenue within the meaning of the schedule may be a doubtful question, but it seems unnecessary to consider that question further, for the first of the General Rules applicable to the schedule provides by para. (*a*) that tax under the schedule shall extend to all profits arising from interest, public annuities, dividends, and shares of annuities payable in the United Kingdom out of any public revenue in the United Kingdom or elsewhere. It follows from this that, notwithstanding the generality of the words of the schedule itself, interest that is not payable in the United Kingdom is not chargeable under the schedule. None of the coupons with which we are concerned was at this material date payable in the United Kingdom, and, but for the sale of the coupons, Miss Paget would have been chargeable to tax in respect of the interest that they represented, not under Sched. C, but under Sched. D, Case IV, as being "tax in respect of income arising from securities out of the United Kingdom except such income as is charged under Sched. C." Before passing, however, from Sched. C, it is desirable, for reasons that will appear later, to consider the provisions made by the rules to such schedule for the collection of the tax with which it is concerned.

The first of the General Rules provides by para. (*c*) that tax under the schedule shall be paid by the persons and bodies of persons respectively entrusted with payment on behalf of the persons entitled thereto. Following immediately after the General Rules are special rules as to interest, etc., payable out of public revenue to or through the Bank of England or the Bank of Ireland or by the National Debt Commissioners, and following those rules are "Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are entrusted." The words "interest, etc.," mentioned in this title plainly refer to the "interest, public annuities, dividends, and shares of annuities payable in the United Kingdom" that are mentioned in the first of the General Rules. By r. 3 of the Special Rules last referred to, it is enacted, so far as material, as follows:

> The person entrusted with payment shall out of the moneys in his hands pay the tax on the dividends on behalf of the persons entitled thereto.

A further rule provides that the payment of the tax shall be made to the
commissioners of inland revenue, and that, in default of such payment,
it shall be recovered from the persons entrusted with payment in the
same manner as other income tax assessed and charged upon him may
be recovered. Dividends in the rule include, no doubt, interest.

Pausing there, it is to be observed that dividends payable in the A
United Kingdom and chargeable under the schedule may not be payable
in the United Kingdom only. The person entitled to be paid the
dividends may have an option of having the coupons paid abroad.
Should he exercise that option, the persons abroad entrusted with the
payment are not and cannot be affected by the Act, and, on presentation B
of the coupons, will pay the dividends without deduction of tax. In
such a case, Sched. C contains no provision for the collection of the tax
at source, and there are no provisions for direct assessment on the person
entitled to the dividends. They would therefore not be chargeable
under that schedule, and would accordingly fall to be charged under C
Sched. D, Case IV, by direct assessment. But the owner of a coupon,
instead of collecting the dividend abroad himself, may cause the coupon
to be sold in this country, or may entrust the coupon to an agent for
collection on his behalf. It is accordingly provided by r. 7 that the
persons therein described under paras. (*a*) to (*d*) inclusive shall be D
included as persons being entrusted with the payment of the dividends
within the meaning of the rules. These persons, so far as material for
the present purpose, are the following : (*b*) Any banker or person acting
as a banker, who sells or otherwise realises coupons for any dividends
(save such as are payable in the United Kingdom only), and pays over E
the proceeds to any person or carries the same to his account ; (*c*) Any
person who by means of coupons received from any other person or
otherwise on his behalf, obtains payment of any dividends elsewhere
than in the United Kingdom ; (*d*) Any dealer in coupons who purchases
coupons for any dividends (save such as are payable in the United F
Kingdom only) otherwise than from a banker or person acting as a
banker, or another dealer in coupons. Being persons entrusted with
the payment of dividends within the meaning of the rules, the duty is
imposed upon them by r. 3 of paying the tax on the dividends on behalf
of the persons entitled thereto out of the moneys in their hands. In G
the case of the person mentioned in para. (*c*), the moneys in his hands
available for payment of the tax will be dividends paid to him abroad,
but, in the case of the sale of coupons by a banker, the dividends will
not be received by him, and the money in his hands out of which he is
to pay the tax on behalf of the persons entitled to the dividends must H
be the proceeds of the sale. Take the case of the person mentioned in
para. (*d*). No dividend may ever reach his hands, for he may sell the
coupons to another dealer, and the second dealer is not a person affected
by the rule. What, then, in his case, are the moneys out of which the
tax is to be paid ? The rule, it is to be noticed, does not say *any* moneys

in his hands, but *the* moneys; and the only moneys in the hands of a dealer who has not himself received the dividend that have any reference to the transaction, and can therefore alone be properly described as "the" moneys, will be the purchase money, and the vendor will receive the net purchase money only after deduction therefrom of the tax. But this is merely a method of collecting the tax, and in no way leads to the conclusion that the purchase price in the cases (*b*) and (*d*) is the thing that is taxed, or that the purchase price is treated by the legislature as being, for taxation purposes, the dividends themselves. For the tax, though paid out of the purchase money, is, according to the rule, the tax on the dividends, and must be calculated by reference to the amount of the dividends, and not to that of the purchase money. Furthermore, the tax is to be paid on behalf of the persons entitled to the dividends, and those persons will be, not the vendor, but those who become the ultimate purchasers of the coupons. The tax will, no doubt, fall in fact upon the vendor, for by reason of the tax he will receive for his coupon less than he would have received had no tax been leviable. But this is what one would expect from the very nature of the business transaction. If a man sells his right to receive a dividend of £100 from a British government security, the purchaser (disregarding, for simplicity, all questions of discount) will pay only £75 for it. The result will be the same when he sells to a coupon dealer, for encashment abroad, a coupon for £100 of a foreign government security that is also payable in the United Kingdom. The purchase price will be £100, for that is what the purchaser will get when he collects the dividend abroad, but, owing to r. 7, the vendor will receive only £75 out of the purchase money, the commissioners of inland revenue receiving the remaining £25. Nevertheless, it is the dividend in each case that is being taxed, and not the purchase money.

Let me now turn to Sched. D, Case IV, for, as I have already pointed out, it is under that case that the interest on the bonds now in question falls to be taxed. The first of the rules applicable to that case is, so far as material to the present purpose, in these words:

> The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not . . . and the provisions of this Act (including those relating to the delivery of statements) shall apply accordingly.

If, therefore, Miss Paget had not sold her coupons, she could have been assessed in respect of the interest to which they refer. But in certain cases the tax on income from securities out of the United Kingdom is collected otherwise than by direct assessment, for it is provided by r. 7 (1) (*a*) of the Miscellaneous Rules applicable to Sched. D as follows:

> Where any interest, dividends or other annual payments payable out of or in respect of the stocks, funds, shares, or securities of any foreign or colonial company, society, adventure or concern . . . are intrusted to any person in the United Kingdom

for payment to any persons in the United Kingdom, the same shall be assessed and charged to tax under this schedule by the special commissioners.

Then comes para. (2) of the same rule, in these words:

> All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person (other than the National Debt Commissioners or the Bank of England or the Bank of Ireland) for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under A
> this rule.

But these provisions do not apply to the present case, for neither the municipality of Budapest nor the government of Jugoslavia can properly be described as a company, society, adventure or concern. The deduction of tax by the coupon dealers from Miss Paget's purchase money B
was, therefore, an illegal deduction. But, even if the municipality and the government had been within the rule, so that the deduction was lawful, that fact alone could not enable the Crown to treat the purchase money as income of Miss Paget brought into tax, for the reasons that I have already given when dealing with the provisions of Sched. C. In C
other words, I am of opinion that, unless the proceeds of the sale of Miss Paget's coupons could, apart from the provisions of r. 7, properly be described as income arising from the bonds in question, they would not have to be treated as being such income merely by reason of these provisions, assuming such provisions to be applicable. D

In these circumstances, the only question to be decided is whether the proceeds of sale of a right to receive income in the future can be treated as income for the purpose of the Income Tax Acts. The question thus broadly stated plainly admits of but one answer, and that answer must be in the negative. The proceeds of the sale for a lump sum of E
an annuity, for instance, are capital in the hands of the vendor, and not income, and this is true even when the subject of the sale is, not the annuity for its whole duration, but the right to be paid the annuity for a number of years, or even for one year. Nor is it any the less true because the purchaser will pay for an annuity that will be subject to a F
deduction of income tax in his hands less than he would pay for a tax-free annuity. Nor is it any the less true because in many cases the net income, when paid to the purchaser, is not income in his hands. In the case, for instance, of a man carrying on the business of dealing with coupons, the sum collected by him on cashing a coupon will be merely G
a trade receipt, and not income. Tax may have been deducted on payment of the coupon, but for sur-tax purposes the interest represented by the coupon cannot be regarded as forming part of the total income of anybody. This is a position that frequently occurs. The net income received by a trustee under a trust for accumulation of income is a case H
in point. But it is easy to conceive cases which, while appearing at first sight to be sales for money or money's worth of a right to receive income in the future, are not in reality sales at all. If a man possessed of a coupon representing interest payable under deduction of tax hands it to his tailor as a convenient method of paying for a suit of clothes, the

tailor, when cashing the coupon, may well be considered as doing so on behalf of his customer, and as then paying himself out of the proceeds. The customer in such a case could not avoid returning the gross amount of the interest as part of his total income for sur-tax purposes. If, on the other hand, the tailor were to accept the coupon in full discharge of his account, the interest that it represents would not, when paid, be income of the customer. Still less would the suit of clothes form part of his income. In the present case, there is nothing to suggest that the transactions between Miss Paget and the coupon dealers merely constituted them her agents for collecting the interest on her bonds, even though, as was probably the case, they did in fact collect the interest, or what represented the interest. The transactions appear to have been *bona fide* transactions of sale and purchase. The moneys received from them by Miss Paget were held by FINLAY, J., to be simply the purchase price of the coupons, and in no sense income from foreign securities. In my judgment, he was right in so holding, and the appeals should be dismissed with costs.

MACKINNON, L.J.: I agree that these appeals fail. The case finds that, as to each set of coupons, Miss Paget sold them " through agents or coupon dealers in London." It is not clear whether this means " to " agents or coupon dealers. Probably all that is known is that she handed the coupons to such a dealer or dealers, and received payments in return. The case also finds that, as to each set of coupons, " the agents or coupon dealers deducted income tax from the proceeds of sale on payment to Miss Paget." This is an ambiguous statement. A coupon dealer may deduct tax as being the agent to collect the tax, and pay it to the inland revenue authorities, in which event he will, pursuant to the Customs and Inland Revenue Act, 1885, s. 26, or its present equivalent, be entitled to a poundage remuneration. Or he may deduct tax as being himself liable to have it deducted when he hands the coupon on to someone who is the agent to collect the tax and pay it to the inland revenue authorities. Or he may deduct tax, not because he, or someone to whom he hands the coupon, is, or can be, the agent to pay the tax, but because he will have to include the proceeds of the coupons, however he realises them, in the income tax account of the profits of his business. Or, lastly, he may have had no other reason than a belief that, under the statutes, it was his duty as a coupon dealer to deduct income tax, and may therefore have quoted Miss Paget a price for her coupons from which he deducted tax at the standard rate. I do not see how, in this case, he could have been acting on either the first or the second of these alternatives, since it would be impossible to calculate the sum (i.e., the sterling equivalent of the amount to be ultimately realised on the coupons abroad) on which tax was payable. I suspect that he must have acted on the fourth ground. In any case, there was apparently no evidence offered to the commissioners to show that the coupon dealers, or any other agents, had collected any dividends and paid income tax thereon to the inland revenue.

The claim to assess Miss Paget for sur-tax upon the amounts she received from the coupon dealers (plus the amounts they deducted) was first said to arise under Sched. C. I think the short but conclusive answer to that claim is that neither the bearer bonds of the city of Budapest A
nor those of Jugoslavia come within the primary rule of Sched. C as being "interest, etc., payable in the United Kingdom." It was argued that they did so become payable by virtue of r. 7 (*d*) of the second set of Special Rules as to Sched. C. But the coupon dealer under that rule is to be "included as being a person entrusted with the payment of B
dividends within the meaning of these rules." That is, he is to be included in a class of persons which has already been defined in the rules. That class is defined in r. 1 and r. 3 of the same *fasciculus*:

> a person who is entrusted with the payment of any dividends which are payable to any persons in the United Kingdom out of any public revenue other than that C
> of the United Kingdom.

Rule 7 is clearly only an enlargement of the machinery for collection of the tax payable under Sched. C. But it cannot enlarge the ambit of Sched. C so as to make it include profits or income other than those which are "payable in the United Kingdom." D

As I think that, for these reasons, neither of these claims can be supported under Sched. C, it is unnecessary to consider the subsidiary point as to the Budapest loan, viz., whether it can properly be said that the interest or dividends from it were "payable out of any public revenue." The alternative claim was put forward under Sched. D, Case IV, as being E
"tax in respect of income arising from securities out of the United Kingdom except such income as is charged under Sched. C." With reference to the intervention of the coupon dealers in this case, reliance is put upon r. 7, of the Miscellaneous Rules applicable to Sched. D, by which the rules under Sched. C are made to apply. So that a coupon F
dealer is "to be deemed to be a person entrusted with the payment of such dividends." But, as "such dividends" are those "payable out of . . . securities of any foreign . . . company, society, adventure, or concern," it might be a question whether either the bonds of the city of Budapest or the bonds of the Kingdom of Jugoslavia came within G
that description. I do not think that it is necessary to discuss that question, for, in my view, the claim to charge Miss Paget under Sched. D, Case IV, in respect of the moneys she received from the coupon dealers must fail upon broader grounds.

Tax under Case IV is to be charged "in respect of income arising from H
securities out of the United Kingdom," and that phrase is repeated in r. 1 of the rules applicable to Case IV. In both these cases the foreign debtors had defaulted, and had refused to pay the interest promised by their bonds. Budapest offered to pay instead a certain amount of pengos which could be enjoyed as currency only within the limits of

Hungary. Jugoslavia offered instead to pay in dinars, or partly in dinars and partly in funding bonds. What Miss Paget sold was the possibility of making some money abroad upon the acceptance of these offers. The money she so received is said to be "income from securities." If Budapest had offered, in lieu of paying the interest due on the bonds, to hand over so many quarters of wheat for each coupon, Miss Paget might have realised some money by selling her coupons to a corn-dealer with foreign trade connections. The Attorney-General did not shrink from the proposition that the money she received from the corn-dealer would be "income from a security outside the United Kingdom." This was logical, but, in my opinion, irrational.

The fundamental fact is that no interest or dividends have been paid on these securities out of the United Kingdom. The debtors have defaulted. But the essential requirement of the charging schedule is that tax shall be payable on the dividends or interest that are paid. The rules as to Sched. C, incorporated as to Sched. D, Case IV, including the rule about the coupon dealer being included as a person entrusted with the payment of dividends, all deal with the payment of "dividends," and the deduction of tax from those "dividends" when they are paid, or deemed to be paid. And, if they were acting under the rules, the coupon dealers would deduct the tax at the standard rate upon the amount of those "dividends." Though they are said to have deducted tax, they cannot have done so upon the amount of the dividends, since none was payable. Presumably, as I said before, they quoted her a price for the coupons, i.e., for the expectation of realising something out of them abroad, and deducted tax from that quoted price. But, if they had agreed to pay her a net price, saying nothing about income tax, I cannot see how they could be charged with an infraction of rr. 3 and 4 of the rules under Sched. C. Rule 7 makes a coupon dealer "a person entrusted with the payment of dividends." Rule 3 says that such a person "shall pay the tax on the dividends on behalf of the person entitled thereto." Rule 4 says that such person shall pay the tax to the account of the commissioners of inland revenue at the Bank of England. If the dividends are not paid, none of this machinery applies, and the coupon dealers here, who are ambiguously said to have deducted tax from the sum they paid Miss Paget, cannot have deducted it under r. 3, and cannot have paid it under r. 4.

That consideration imports another. Miss Paget can be liable for sur-tax only on income liable to assessment to income tax, or income that has paid income tax by suffering deduction. Here she has received a smaller price for what she sold, and that is said to have been by virtue of deduction of tax. But there was no evidence on which the commissioners could or did find that the income had suffered deduction of tax in the true sense, viz., that any agent to pay dividends to her, or anyone by the Acts deemed to be such an agent, had paid tax on her behalf to the inland revenue commissioners.

The fact remains that Miss Paget, as a result of her ownership of these coupons, has received certain sums of money. Whether she could be called upon to include those sums in her return of total income for the purposes of sur-tax by virtue of some other part of the legislation is not for me to speculate. But I am satisfied that the contention that she must do so under Sched. C, or under Sched. D, Case IV, is, for the reasons I have given, unfounded, and therefore both these appeals must be dismissed.

Appeals dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners); *Allen & Overy* (for the Hon. Dorothy Wyndham Paget).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

Re SMITH, THE DEBTOR *v.* OFFICIAL RECEIVER, *Re* SHAW, THE DEBTOR *v.* OFFICIAL RECEIVER.

[Court of Appeal (Sir Wilfrid Greene, M.R., Clauson, L.J., and Luxmoore, J.), **January 25, 1938.**]

Bankruptcy—Practice—Appeal—Appeal by debtor—Costs of Official Receiver—Form of order.

Where, on an unsuccessful appeal by the debtor, the Official Receiver becomes entitled to his costs, he is entitled to an order for taxation, for payment out of the £20 security paid into court, and for any remaining amount of his costs to be paid out of the estate.

[**EDITORIAL NOTE.** The form of order here made follows the usual form which has been made when an appeal from a receiving order is dismissed and the Official Receiver is a party. The form of the order appears never to have been questioned before. It has been in use for a number of years, and by the decision in this case it receives the approval of the Court of Appeal, and becomes the recognised form of order in such cases.

As to Costs of Official Receiver, see HALSBURY, Hailsham Edn., Vol. 2, pp. 148-150, paras. 192-196; and for Cases, see DIGEST, Vol. 4, pp. 202, 203, Nos. 1868-1879.]

Case referred to:

(1) *Re Brogniaux.* Unreported.

Appeals from two orders, one made by Mr. Registrar Parton, dated Dec. 16, 1937, and the other by Mr. Registrar Stiebel, dated Dec. 22, 1937.

G. F. Kingham for the appellant in both appeals.

The Solicitor-General (*Sir Terence O'Connor, K.C.*,) and *V. R. Aronson* for the Official Receiver in both appeals.

Kingham: I ask that both these appeals may be dismissed with costs.

Some doubt having been expressed as to the proper form of the order relating to the costs of the Official Receiver, the Solicitor-General made the following statement as to the practice in such cases.

The Solicitor-General: The order I am asking your Lordships to make is the usual order that has been made by the Court of Appeal. I have three recent orders here. I will read one to your Lordships. The others follow this one exactly. This was an order made on Nov. 1, 1937:

> That the costs of the Official Receiver, the respondent, be taxed by the taxing master of this court and that the sum of £20 paid into court by or on behalf of the appellant as security for costs of this appeal, be paid out of court to the Solicitor, Board of Trade, Great George Street, London, S.W.1, on account of the respondent's taxed costs of this appeal, but if the said deposit be insufficient then it is ordered that the amount remaining unpaid be paid out of the estate.

An exactly similar order was made in the case of Jack Silk on July 1, 1937, and in the case of Frederick Sidney Cotton on Nov. 9, 1937. In each case the appellant was the debtor. One of these was a decision of the Divisional Court, Luxmoore and Farwell, JJ.

Sir Wilfrid Greene, M.R.: Mr. Solicitor, it certainly looks as though the practice goes back, at any rate, to Lord Cozens-Hardy, M.R., as appears from Ringwood, 17th Edn., p. 286. I understand that when the orders are made in the usual form they are drawn up in accordance with that instruction.

The Solicitor-General: Yes, my Lord, that is so.

Sir Wilfrid Greene, M.R.: Certainly in making orders in the past, as long as I can remember, I have always apprehended that I was following the usual practice.

The Solicitor-General: Yes, my Lord. The case that Clauson, L.J., had in mind, I think, was the case of *Re Brogniaux* (1), and I have the order in that case too. What happened in that case was that the Official Receiver was himself appealing against the decision of the receiving order. He successfully appealed to the Divisional Court, and at the conclusion of the discussion there was an argument about what should be the proper order as to costs. I have a transcript of that argument, from which it appears, if I may say so, that nobody seemed to mind very much in what form the order went. No serious argument was, I think, addressed to the court. But, when that case came to the Court of Appeal, as it did, on the appeal of the appellant from the Official Receiver's victory in the Divisional Court, the Court of Appeal made the order in the form for which I am contending. I have here the order of the Divisional Court, which omits any reference to the costs coming out of the estate, and in the Court of Appeal it is in the form for which I am now asking. The footing on which I am instructed to put it is this: the Official Receiver as such, before a trustee is appointed, has no means of getting his costs out of the estate, unless by an order of the court, or unless he can come under the umbrella of the Bankruptcy Rules, 1915, r. 117. So far as the Official Receiver is concerned, it is immaterial to him whether your Lordships so interpret r. 117, as has been suggested, or whether the present practice, as I venture respectfully to submit it is the present practice, is pursued. So to construe r. 117 would, I think, with great respect, create some difficulties, because, if your Lordships will look at the main rule, which is the Bankruptcy Rules, 1915, r. 96, that rule provides in sub-rule (1):

> The court in awarding costs may direct that the costs of any matter or application shall be taxed and paid as between party and party or as between solicitor and client, or that full costs, charges, and expenses shall be allowed, or the court may fix a sum to be paid in lieu of taxed costs.

Then sub-rule (2) is the important one:

> In the absence of any express direction costs of an opposed motion shall follow the event, and shall be taxed as between party and party.

Nobody suggests that that would be an appropriate order in the case of the Official Receiver, so that upon that rule it would appear that it is necessary that there should be an express order of the court of the kind that I am asking your Lordships to make. It is a little difficult, in my submission, to read r. 117 as being an alternative method where there has been an express rule as to costs as being a rule relating to the Official Receiver's costs. I think it could come in only under the second of those headings. In my submission, it cannot come in under the first, "The actual expenses incurred by the Official Receiver in protecting the property or assets of the debtor"—that is not appropriate—"or any part thereof," and the next part of the sentence does not apply. Then the second is, "The fees, percentages, and charges payable under Table B of the Scale of Fees." That does not apply, because I have looked through Table B, and those are the ordinary routine charges of drawing up the receiving order and solicitor's costs. Does it come in, then, under the second part of that sentence: "and any other fees payable to, or costs, charges, and expenses incurred or authorised by, the Official Receiver"? The view that has been held by those instructing me over a very long period of years is that those words, in view of the existence of the express words in r. 96 (2), do not give the Official Receiver a statutory right to take his fees out of the estate when a trustee has been constituted. The practice has been that the Official Receiver has gone to the trustee armed with an order of the court which enables him to proceed with the taxation of costs. I have therefore certainly got the practice on my side, and, in my submission, it would be putting an interpretation upon this rule which is a little strained, and perhaps a little unnecessary, in view of the practice that exists as to the express power given to the court under r. 96 (2).

Sir Wilfrid Greene, M.R.: We do not think we need trouble you any further in this matter. Of course, what you have been saying is confined to the costs of the Official Receiver?

The Solicitor-General: Yes, my Lord.

Sir Wilfrid Greene, M.R.: It has nothing to do with the costs of a trustee, for instance, where a trustee has been appointed, if he is a party to some petition?

The Solicitor-General: No, my Lord.

SIR WILFRID GREENE, M.R.: It relates purely to the position of the Official Receiver's costs.

The Solicitor-General: Yes, my Lord, he having no statutory position at all, as has been held.

SIR WILFRID GREENE, M.R.: We shall follow the usual practice,
A and make the order in the usual form. That applies to both these cases. In both cases, they are dismissed by consent.

Order made in the form above set out.

Solicitors: *Bernard Shaffer & Co.* (for the first appellant); *Harold Shephard* (for the second appellant); *Solicitor to the Board of Trade* (for
B the Official Receiver).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

BROUGHTON *v.* SNOOK.

C

[CHANCERY DIVISION (Farwell, J.), **December 15, 16, 17, 1937.**]

Specific Performance—Sale of land—Part performance—Expenditure on alterations—Mental weakness of defendant—Capacity to contract—Onus of proof—Law of Property Act, 1925 (c. 20), *s.* 40.

D S. was in 1935 the owner in fee simple of a country inn, let to a brewery company on a long lease expiring at the end of 1936, and sublet to a quarterly tenant. The plaintiff, who was in occupation of licensed premises in Sheffield, was desirous of taking a smaller place in the country. He got into touch with S., and a verbal contract was made for the sale by S. to the plaintiff of his inn for £2,000, the sale to be completed on Jan. 1, 1937. The plaintiff wanted to pay a deposit,
E but S. was not prepared to accept it. In Sept., 1936, the tenant of the inn, finding another inn suitable for himself, made arrangements with the plaintiff to come into occupation, which he did with the knowledge and consent of S. The plaintiff carried out substantial alterations and decorations on the premises, of which S. expressed approval. In Dec., 1936, S. was a man nearly 80 years old, though quite capable of transacting business, but in that month he became seriously ill, and from
F then until his death in Mar., 1937, he was quite incapable of transacting business. In an action by the executors of S. for specific performance of the contract, it was contended that S. was incapable, by reason of his health, of entering into the alleged contract, and, on the other side, that the expenditure on the alterations and decorations amounted to acts of part performance:—

G HELD: (i) to substantiate a defence of incapacity to contract, it would have been necessary to show that the incapacity was known, or ought to have been known, to the other party.

(ii) in an action for specific performance, the plaintiff is not bound to prove that S. was in such a state of physical and mental health as to be able to contract. If a question of capacity to contract is to be raised, the defendant must show a *prima facie* case of incapacity.

H (iii) the expenditure on alterations and decorations was an act which was, in all the circumstances of the case, referable only to the contract, and therefore sufficient to defeat the plea of the statute.

[**EDITORIAL NOTE.** There has been a tendency in specific performance cases, where acts of part performance are relied upon, to regard the payment of money as not being referable only to the existence of an oral contract to purchase the property. An exception, however, has been made in the case of expenditure on alterations or repairs, but even in this case it must be proved that the alterations or repairs have been done by the plaintiff as the new owner of the property. The defendant in the present case attempted to place upon the plaintiff the onus of proving the capacity of the defendant to contract, and the fact that the contract was not tainted by undue influence, nor was it a sale at an under-value. The court has held, however, that, if these questions are to be raised, the onus in regard to them lies upon the defendant. A

AS TO EXPENDITURE OF MONEY AS PART PERFORMANCE, see HALSBURY, 1st Edn., Vol. 27, Specific Performance, pp. 33-35, para. 52; and FOR CASES, see DIGEST, Vol. 40, p. 40, Nos. 233-237.]

Cases referred to:

(1) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 599; 33 Digest 130, *57*; 61 L.J.Q.B. 449; 66 L.T. 556. B

(2) *Rawlinson* v. *Ames*, [1925] Ch. 96; 30 Digest 382, *457*; 94 L.J.Ch. 113; 132 L.T. 370.

(3) *Nunn* v. *Fabian* (1865), 1 Ch. App. 35; 30 Digest 387, *512*; 35 L.J.Ch. 140; 13 L.T. 343.

C

ACTION for specific performance of an oral contract for the sale of land. The facts of the case are set out in the judgment.

C. E. Harman, K.C., and *F. C. Watmough* for the plaintiff.

R. F. Roxburgh, K.C., and *J. H. Boraston* for the defendants.

Roxburgh, K.C.: In connection with acts of part performance it is D necessary to prove that they were done with the knowledge of the party concerned. The relationship between Mr. Snook and the brewery company was that of landlord and tenant, and, if it be true that the consent of Mr. Snook was ever asked for and obtained, it was an act which was quite equivocal. In pursuance of that arrangement, it is alleged E that the plaintiff procured a transfer of the licence, but it is not alleged that Mr. Snook knew of that. Until the expiration of the lease, the plaintiff was occupying the inn as a tenant of the brewery company, and, if that is so, he would not be occupying under the contract alleged in this action. The lease expired on Dec. 31, 1936, and at that time F Mr. Snook was quite incapable of attending to business. It is impossible to found anything upon continuance in possession in such circumstances. So far as I know, in no case has it been decided that it is necessary to prove that the person alleging part performance knew of facts affecting the other party in order to escape from the consequences. It has never G been decided how far it is an answer for the court to find that to the plaintiff's knowledge the facts are such that it would not be a fraud for the defendant to take advantage of the fact that the contract was not in writing. If it is an act which has not been brought about by misconduct, it would not be a fraud. Supposing Mr. Snook had been H certified as insane on Dec. 31, and the fact proved, no advantage could be taken of the act of part performance, even though the plaintiff had not the slightest idea of the fact. The knowledge of how bad the deceased's health had become was ever present to the mind of the plaintiff. [Counsel referred to *Rawlinson* v. *Ames* (2).]

Harman, K.C.: It is said that I have to prove not only acts of part performance but also that Mr. Snook was in a fit condition to understand them. It is also said that I must prove that the price agreed upon for the property was a proper one. Mr. Snook stood by and allowed the plaintiff to enter, and to spend money upon the property. The defendants A cannot get out of that unless Mr. Snook misunderstood and they can prove that the plaintiff knew it. There is ample in the present case to prove an equity. Taking over the tenancy would not in itself be an act of part performance, but the plaintiff took it over with the knowledge and with the approval of Mr. Snook. That is clearly an act of B part performance. [Counsel referred to *Nunn* v. *Fabian* (3).]

Farwell, J.: The plaintiff in this action is seeking specific performance of a verbal contract entered into in Apr., 1935, between himself and one Mr. Snook. Mr. Snook has died since the date of the contract, C and the defendants are his executors. One of the defences is that which is familiarly known as the Statute of Frauds, but is now the Law of Property Act, 1925, s. 40. In answer to that, the plaintiff relies upon certain acts of part performance which he says are sufficient to take the case out of the statute.

D Mr. Snook, in 1935, then in the late seventies, was the owner in fee simple of an inn known as the Bridge Inn at Calver, in the county of Derby. Mr. Snook had purchased the freehold of that property some years before, and he had subsequently let it on a long lease to a brewery company. The lease was at an annual rent of £150, and it expired on E Dec. 31, 1936. The price which Mr. Snook had paid for it when he purchased it was £3,900. The inn was let to a quarterly tenant and in May, 1935, it was let on a quarterly tenancy to one Mr. Heathcote, at a quarterly rent of £40. The plaintiff in this action has been engaged in the licensed victuallers' trade during practically the whole of his life. F He was the licensee and occupier of the Museum Hotel in Sheffield. That hotel was a flourishing business, and Mr. Broughton had carried on business there for 10 years in a prosperous way. He was minded at that time to retire into the country. I do not mean that he was minded to retire altogether, but that he intended to go to a smaller hotel, where he G would live in the country, instead of living in the town. He heard that there was a possibility that Mr. Snook might be willing to sell the Bridge Inn. Mr. Broughton knew the Bridge Inn well, and his wife had relations living near to it. Mr. Snook was an elderly man, well-known in the neighbourhood, and was much respected, although Mr. Broughton H did not know him. The latter approached a Mr. Nadin, who was known to Mr. Snook. Mr. Nadin, on being asked by Mr. Broughton to assist him in the matter, went to see Mr. Snook, and, on the outcome of that, Mr. Nadin took Mr. Broughton to see Mr. Snook.

There was a meeting between them on Apr. 12, 1935. At that meeting there were present Mr. Nadin, Mr. Snook, Miss Snook, his daughter, and the plaintiff. There was some discussion about the possibility of the hotel being sold by Mr. Snook, and on the evidence I have no doubt that Mr. Snook agreed to sell the inn and the land, some nine acres, for £2,000. It was agreed that the sale should not be completed until after the termination of the existing brewery lease. That lease was coming to an end on Dec. 31, 1936, and in the meantime the sitting tenant was not to be disturbed. Mr. Broughton was anxious on that occasion to pay a deposit. Considerable importance seems to be attached, in this part of the country at all events, to the payment of a deposit. It seems to be thought that it is some evidence of the existence of a contract, and Mr. Broughton was prepared to pay a deposit to Mr. Snook. Mr. Snook was not prepared to accept a deposit then, nor to record anything in writing. There was an oral agreement between Mr. Broughton and Mr. Snook by which Mr. Broughton agreed to buy and Mr. Snook agreed to sell the Bridge Inn for the sum of £2,000, but the sale was not to be completed until Jan. 1, 1937, and in the meantime the sitting tenant was to remain. The evidence with regard to that, to my mind, is completely satisfactory.

On Apr. 13, Mr. Snook went to Sheffield to the plaintiff's hotel. He saw the plaintiff there, and there was some more discussion. Mr. Broughton's evidence is that Mr. Snook confirmed the agreement which had been come to the day before. If I had any doubt about the creation of such an oral agreement, which I have not, upon the evidence, I should be perfectly convinced of it by certain incidents which happened subsequently. Mr. Broughton seems to have become on very friendly terms with Mr. Snook. They both had motor cars, and on frequent occasions after this time Mr. Broughton went with Mr. Snook on various motor trips. It was their custom to visit certain public houses or inns, and on one occasion they went to the Bridge Inn. Mr. Heathcote, the licensee and tenant, was there, and he has given evidence. I do not think that anyone could have doubted the evidence which he gave. He had no interest of any sort in the matter. He gave evidence that on one occasion Mr. Snook said: "That is the man I have sold the Bridge Inn to." It was something of a shock to Mr. Heathcote, and he was told by Mr. Broughton that he would not interfere with his tenancy and that he could remain, so far as he (Mr. Broughton) was concerned, until the end of his lease. There were two other witnesses, who deposed that Mr. Broughton was introduced to them by Mr. Snook as the person to whom he had sold the Bridge Inn. As I have said, I have not the smallest doubt that there was a definite oral contract for the sale of the inn by Mr. Snook to Mr. Broughton for £2,000, completion to be at the end of the lease. Mr. Broughton, not unnaturally, thought the position a somewhat unsatisfactory one. He had nothing to show. He had not been able to get Mr. Snook to accept a deposit, and there was nothing in writing. In May, 1935, he rang up Mr. Snook's solicitors and spoke of arranging a meeting between himself and Mr. Snook and his solicitors with a view to getting some formal contract, or some written memorandum of the contract.

The next thing of importance is this. In Sept., 1936, Mr. Heathcote, who was the tenant of the inn, got into communication with the plaintiff and told him that he had found another inn, which he thought would be suitable for himself. It was in the neighbourhood, and belonged to the same brewery as his landlords, and he thought that it would be convenient if he could transfer to that inn in Oct., 1936. He inquired if it would be possible for Mr. Broughton to take over the Bridge Inn before the end of the year, so that Mr. Heathcote could move from the Bridge Inn to the inn he would like to take. Mr. Broughton was prepared to enter at the end of 1936, but in Oct., 1936, he was carrying on a successful business in Sheffield, and he was asked whether he would give that up at short notice and go into the Bridge Inn. It was necessary that there should be somebody at the Bridge Inn to whom the licence could be transferred. He communicated with Mr. Snook before he actually agreed, and he asked Mr. Snook if he would consent to the change being made, not at the time originally agreed (on Jan. 1, 1937), but in Oct., 1936, and Mr. Snook acquiesced in that. He consented to Mr. Broughton taking over the inn in Oct., 1936. I have no doubt that Mr. Snook was consulted as to that and consented to it. Accordingly, on Oct. 19, 1936, the plaintiff gave up his hotel in Sheffield and moved into the Bridge Inn. Moreover, when he got into the inn, he proceeded to make suitable alterations and improvements to the property. He put in a new fireplace—a new grate—in one room. He altered a door, and did various decorations, including papering the place. Altogether he expended something just under £200 in alterations and decorations to the premises. After Oct. 19, 1936, when Mr. Broughton took possession of the Bridge Inn, Mr. Snook paid a certain number of visits to it. There is some little doubt as to the exact number of visits he paid, but he paid at least two visits, because Miss Snook has said that she went on two occasions, and there is no doubt that her father saw some of the alterations and decorations which were being done, and that he expressed his approval of what was being done. In my judgment, it is quite plain that Mr. Snook was not only perfectly well aware of, and consented to, the taking possession of the inn by Mr. Broughton in Oct., 1936, but also perfectly well aware that Mr. Broughton was doing substantial alterations and decorations to the premises. He assented to that, and in no way objected. On the contrary, he expressed approval of what was being done. On or about Dec. 16, 1936, Mr. Snook became very seriously unwell, and he was more or less bed-ridden from that time until his death, in Mar., 1937. About the middle of December, it is complained, Mr. Snook was not really in such a condition as to be capable of transacting business. Down to that date he seems to have been going about in the normal way, going to the Bridge Inn and other places. He did not seem more to the layman's eye than a feeble old man. He had suffered from serious ill health. Some two years earlier, he had had a stroke, or a fit of some sort, and he was seriously ill. That left him feeble, and he did not find it very easy to get about. He had to use sticks. He had a slight impediment in his speech, and there is no doubt, on the evidence I have heard, that he was a very sick man. However, he had to a considerable extent recovered from that, but had suffered from a thickening of the arteries, and, as one of the results of that complaint, he had had, at Christmas, 1934, a serious heart attack. Again he had recovered from that, although, of course, the condition of the arteries is not one from which one can recover at that age. It is a complaint which slowly progresses, and it is a serious condition which produces unhappy effects in the sufferer. One of the results of such complaint is that the heart does not drive the blood sufficiently strongly, and this may have the effect of starving the brain. It produces a condition, as one of the doctors told me, which varies from time to time. A man at some periods may suffer much more seriously than at others, and his mental capacity may be more seriously impaired at some times than at others. A man who suffers from that kind of complaint may appear reasonably normal to the ordinary layman, and at other times he may appear less normal, and be less capable of carrying on business. There was a very serious deterioration of his health in Dec., 1936, and from somewhere about that date until the time of his death he was quite unable to deal with any business matter.

As I have said, he died in Mar., 1937, and by his will he appointed his daughter, Miss Snook, and the other defendant, his solicitor, to be his executors. It is not material how the property was disposed of, because the executors are the proper parties to this action. They did not interfere with the plaintiff's occupation of the inn, nor did they demand rent from him. They took no steps in the matter until May, 1937, when they advertised the inn for sale in one of the Sheffield papers, and the advertisement came to the notice of Mr. Broughton. The advertisement stated that the inn was in the occupation of a tenant on a short tenancy. Mr. Broughton, on seeing the advertisement of the sale of the inn, was naturally perturbed, and his solicitors got into touch with the solicitors acting, and finally this action was commenced. The sale was postponed and this action was commenced, and it now falls to me to determine the rights of the parties, in these circumstances. I desire to repeat again that the evidence completely satisfies me that there was an oral contract, and I am completely satisfied that Mr. Snook agreed and consented to the removal by Mr. Broughton from the hotel at Sheffield into the Bridge Inn. I am satisfied, too, that he was well aware of the fact that Mr. Broughton was doing alterations and repairs to the Bridge Inn, and that he consented thereto. On this, I have to consider whether the position is one which entitles the plaintiff to the specific performance of the contract.

Having heard the evidence, I have not any doubt as to the facts which

I have stated. In these circumstances, what is the legal position? The defendants seek to take advantage of the Law of Property Act, 1925, s. 40, and they also raise certain other defences to which I must refer. By an amendment to the defence, it is pleaded that the defendants deny that any contract for the sale of the inn was entered into as
A alleged, or at all, and they say that Mr. Snook by reason of his health was incapable of transacting business or of entering into any such contract as alleged. That plea, if it is intended to be a plea, that the verbal contract could not be binding upon Mr. Snook by reason of the fact that, at the date when it was made, his mental condition was such as to render
B him incapable of transacting business, is a plea which is clearly demurrable. Such a plea is not one upon which reliance can be placed, because to entitle the defendants to rely upon such a plea they should plead, as well as prove, that the condition of the other party was known to the plaintiff, or should have been known to him. If authority for that
C proposition is wanted, it is to be found in *Imperial Loan Co.* v. *Stone* (1). If the plea was intended to be a plea that, at the date of the contract, Mr. Snook was incapable of transacting business at all, then, in order to make it a defence upon which reliance can be placed, it must be shown to be known to both parties. There is no such plea here at all, and, in
D my judgment, so far as that part of the defence is concerned, it is not a plea on which the defendants are entitled to rely. No evidence as to the mental condition of Mr. Snook at that time is admissible, because it is irrelevant.

Mr. Roxburgh, I think, realised his difficulties in that respect, and he
E thereupon said that he was not relying upon that plea with regard to the formation of the contract itself, but that he was going to make use of it for the purpose of showing that the acts relied upon as part performance were acts which could not be relied upon, as Mr. Snook was not in a position to appreciate what he was doing, owing to the poor state of his
F physical and mental health.

I have therefore to consider how far this plea is admissible at all with regard to that matter. Before I come to that, I think that it is desirable to go back a little, and to consider what is necessary to make an oral contract for the sale of land one which may be specifically performed.
G There is nothing innately immoral, illogical or improper in an oral contract relating to land, and, if there is an oral contract relating to land, if one of the parties chooses to have it specifically enforced, it is enforceable unless one of the other parties pleads the Law of Property Act, 1925, s. 40. In my own recollection, there was a case in which the
H pleader forgot to insert the Statute of Frauds as a defence, and at the trial sought for leave to amend by pleading the statute, which was refused. The court said that, having allowed the matter to go to trial, it was too late then to amend, and specific performance was decreed. It is unnecessary for a defendant, if he does not choose so to do, to plead the statute, and the court is not bound to take notice of it. In the

absence of a plea of the statute, an oral contract is enforceable. Here the defendants have relied upon the section. *Prima facie* that is a good answer to the claim, and it is for the plaintiff to satisfy the court that he is entitled to succeed notwithstanding that plea. If the plaintiff can show that he has done acts which can have been done only with reference to the oral contract, and which would render it a fraud upon him to allow the defendant to set up the statute as an answer to the claim for specific performance, then, in those circumstances, if the facts are proved, it may give a sufficient escape to the plaintiff from the difficulty in which he is placed by this plea. What is necessary to set up a plea of part performance is to be found in Fry on Specific Performance, 6th Edn., at pp. 276, 277:

> In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: (i) the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; (ii) they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; (iii) the contract to which they refer must be such as in its own nature is enforceable by the court; and (iv) there must be proper parol evidence of the contract which is let in by the acts of part performance.

That statement is not only a statement by a very learned author, but it has also received judicial approval, and it is undoubtedly the law which I have to apply. It is said, and has been argued on behalf of the defendants, that, in order that a plaintiff may succeed in setting up this plea of part performance, he must show that the contract is one to which he would be entitled otherwise to specific performance. That is to say, he has to show, in the words of Fry, L.J., that the acts of part performance "must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing."

Taking advantage of these last words, it is argued that not only does this throw on the plaintiff the onus of showing that there were acts which were referable to the contract, and referable to the contract only, and acts which in themselves might be sufficient to be part performance, but also he must go on, and prove affirmatively that there is nothing which prevents the contract from being enforceable otherwise.

He contends that not only must it be shown affirmatively by the plaintiff that the acts of part performance were such as to render it a fraud in the defendants to take advantage of the contract not being in writing, but also the plaintiff must show that the contract was not at such an undervalue as would amount to fraud, or that the contracting party was not under some mental or physical disability that would render it impossible for the contract to be enforced. That is a contention which I am wholly unable to accept. The plaintiff had to prove the existence of an oral contract. There had to be clear evidence that there was such a contract. If there be evidence of such a contract, the plaintiff may enforce that contract unless the defendant sets up the statute. If the defendant sets up the statute, it may be open to the plaintiff to avoid that difficulty by showing that there were acts which were referable only to the contract, and which would render it a fraud for the defendant to take advantage of the fact that the contract was not in writing. That is, if he can show that the defendant has stood by and permitted the plaintiff to do things by which he has altered his position, and if such standing by and consent can only have been in reference to the contract, then the plaintiff has done all that he is required to do to get himself out of his difficulty. If the defendant seeks to rely upon such a plea as undervalue, or that of the mental or physical incapacity of the vendor, those are matters which the defendant must plead specifically, and must prove, and the onus of proving that the facts were not so does not lie upon the plaintiff. The ordinary course, if the defendant sets up the statute as a defence, is for the plaintiff to plead the acts upon which he relies, and, if the defendant desires to set up such a defence as I have suggested, it is for him to seek to amend his defence by setting up those matters on which he relies, in addition to the defence of the statute. In my judgment, in such a case as this, to suggest that the plaintiff must come to the court armed with evidence that the vendor was a person of sound mind, or with evidence that the property was not sold at an undervalue, is fantastic. It must be set up and proved by the defendant. Moreover, I desire to say, with reference to this case, that, so far as any question of undervalue is concerned, that is not open to the defendants on any showing now, because that is not pleaded. With regard to the mental condition of Mr. Snook, that is not open to the defendants on this defence, because, in my view, if the defendants are relying upon the mental or physical condition of the defendant as showing that the acts done by that person cannot be relied upon, then he is clearly bound to plead and prove the knowledge of the other party, as in the case to which I have referred. In the absence of a plea that the facts were known to the plaintiff, the defendants cannot rely upon such a defence. In this case, I did permit medical evidence to be given. On the latter point, in case this action should go further, and another court should take a different view of this matter from that which I have taken, it would be very inconvenient if such evidence had not been admitted. Therefore I permitted that evidence to be given. Personally, to my mind, it is irrelevant, and I cannot in any sense rely upon it, but, in the event of this matter going further, the result of the medical evidence, in my view, is that Mr. Snook, although unwell at the time down to the middle of December, and although he was an old gentleman, and rather shaky on his legs and not very quick on what is sometimes called the uptake, was otherwise reasonably normal, and capable of entering into contracts. I think that it is quite plain that, after the middle of December, he was in a condition in which he was incapable of entering into contracts. Whether or not before that date his condition was such that he was incapable of doing business may be open to doubt. I do not think that it was. Even if it was, his condition certainly was not apparent to the plaintiff.

I am quite satisfied that the plaintiff did not know that he was in such a condition. I say no more about that, because, in my judgment, it is not relevant to this action.

The plaintiff has proved an oral contract. He has proved that Mr. Snook knew of, and consented to, his leaving the inn at Sheffield and going to the Bridge Inn. He has proved that Mr. Snook knew he was spending money on doing repairs and alterations at the Bridge Inn, and he says on that that he is entitled to succeed in this action. That seems to me to bring in the real difficulty in this case. Are the acts upon which the plaintiff relies sufficient to make this a sufficient part performance to entitle the plaintiff to succeed ? Undoubtedly any acts relied upon must be acts which are necessarily referable to the oral contract. It has been held that mere payment of money is not sufficient. The money paid may be in fact the price agreed upon as the price of the contract. There is nothing in the payment of money to connect it in any way with the subject-matter of the oral contract. It might well be that the court, finding the money paid without any explanation, might think that it was paid under an oral contract. But that is not enough. The mere payment of money is not necessarily connected with the subject-matter of the contract, and may have been paid for many reasons other than the contract itself. Where the owner of property, being himself in possession, permits the plaintiff to enter upon the property, and permits him to spend money upon the property, that is *prima facie* sufficient, because entering into possession of property and spending money upon that property are directly connected with the subject-matter of the contract, and there can, *prima facie*, be no reasonable explanation of the defendant permitting the plaintiff to do such acts except by reference to the contract itself. The court will not presume an illegality. It will not presume that the plaintiff is a mere trespasser. In these circumstances, the court has said that such acts are necessarily referable to the contract, and are sufficient to bring the matter within the rule as to part performance, because it would be wrong to permit the defendant to alter his position, to turn round subsequently and say that there was only an oral contract, which cannot be enforced. These considerations bring me to this difficulty. Can I say here that the acts relied upon are necessarily referable to the contract ? I know of no case, with the possible exception of one, which is not very helpful, in which circumstances exactly similar to those here have arisen, because, at the time when the plaintiff went into occupation of the inn, it was not occupied in any way by Mr. Snook, but it was occupied by a tenant of the brewers, and, so far as the entry is concerned, it is not necessarily referable to the contract at all. Similarly the expenditure of money upon the premises by Mr. Broughton is explicable, because he may have been so foolish a person as to spend money upon the property notwithstanding that he could be evicted from the premises at the end of two months or so. That being so, it cannot be said that the acts are necessarily referable to the contract. In my judgment, "necessarily referable to the contract" does not mean that the acts must be solely referable, because there may be some other explanation, however fantastic that explanation may be. The court, in my judgment, has to look at all the circumstances, and has to determine whether, in all the circumstances of the particular case, the acts can be said to be necessarily referable to the contract. The fact that an ingenious mind might suggest some other possible explanation is not necessarily fatal to the plaintiff. The court must be satisfied that the acts relied upon are necessarily referable to the contract, having regard to all the circumstances. In the present case, it is almost fantastic to suppose that a business man, such as the plaintiff undoubtedly is, would have abandoned his flourishing business in Sheffield and have moved into this comparatively small inn, with a comparatively small business, and expended quite a considerable sum of money upon the repairs, if he contemplated the possibility of his being evicted at the end of that year. It is accordingly impossible, in my view, to imagine that Mr. Snook himself consented to the plaintiff's taking over the premises, and that he acquiesced in the spending of money on the footing that he would be able to evict the plaintiff at the end of the year and take advantage of the expenditure which the plaintiff had made upon the premises. Assuming that Mr. Snook was a man who acted, and intended to act, rightly, it is impossible for me to assume that Mr. Snook permitted these things to be done, and that he acquiesced in the expenditure, unless he knew there was in existence an oral contract under which Mr. Broughton became the owner of the property. In my judgment, in all the circumstances, I think that there is sufficient to bring the case within the four walls which are necessary to establish the plea of part performance, and that, consequently, the plea of part performance is enough to defeat the plea of the statute. Accordingly, I decree that the plaintiff is entitled to the relief which he seeks. There is no claim for damages. The order must be for specific performance. The plaintiff must pay the purchase price of £2,000, and must pay interest thereon at the rate of 4 per cent. from Jan. 1, 1937. The defendants must pay the costs of the action. The counter-claim must be dismissed with costs. The order can be in the form that there can be specific performance on the plaintiff's accepting the conveyance to Mr. Snook in 1900 as the root of title.

Solicitors: *Gibson & Weldon*, agents for *Smith, Menneer & Co.*, Sheffield (for the plaintiff); *Vizard, Oldham, Crowder & Cash*, agents for *Edward W. Pye-Smith & Son*, Sheffield (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

TIMES FURNISHING CO. LTD. *v.* HUTCHINGS.

[King's Bench Division (Humphreys, J.), **January 25, 26, 31, 1938.]**

Hire Purchase—Distress—Provision for automatic determination of agreement—Effect of—Goods in possession, order or disposition of tenant—Law of Distress Amendment Act, 1908 (c. 53), ss. 1, 4.

The plaintiffs, the owners of furniture, let it upon the usual hire-purchase agreement to a tenant, and the landlord, upon the tenant becoming in arrear with his rent, distrained upon the furniture. The plaintiffs then gave notice under the Law of Distress Amendment Act, 1908, stating that the furniture was their property and the distress illegal. The landlord contended that the furniture was either subject to a hire-purchase agreement within sect. 4 of the Act or in the possession, order or disposition of the tenant. The hire-purchase agreement provided for its determination on notice, and also for its automatic determination if any landlord threatened or took any steps to levy a distress for rent upon the furniture:—

Held : (i) the two clauses, one providing for determination on notice, and the other for automatic determination, are not inconsistent, and each must be read separately and applied to the events to which it relates. The furniture ceased, therefore, to be subject to a hire-purchase agreement the moment a distress was levied.

(ii) the furniture was, however, in the possession, order or disposition of the tenant, and the distress was valid, being protected by the Law of Distress Amendment Act, 1908, s. 4.

[EDITORIAL NOTE. Draftsmen of hire-purchase agreements have, since the judgment in *Smart Bros., Ltd.* v. *Holt* (1), generally relied upon that decision to support and justify the automatic determining clause considered herein. In this case it is now decided that in this they have been correct, but they appear to have been less successful in dealing with the position that the goods are in the possession, order or disposition of the tenant. It remains to be decided whether the consent to the possession of the tenant can also be automatically determined, and the clause can thus be perfected and achieve its intended purpose.

As to Distress and Hire-Purchase Agreements, see HALSBURY, Hailsham Edn., Vol. 10, pp. 472-474, para. 606; and for Cases, see DIGEST, Vol. 18, pp. 305-307, Nos. 420-427.]

Cases referred to :

(1) *Smart Bros., Ltd.* v. *Holt,* [1929] 2 K.B. 303 : Digest Supp. ; 98 L.J.K.B. 532 ; 141 L.T. 268.

(2) *Hickenbotham* v. *Groves* (1826), 2 C. & P. 492 ; 5 Digest 793, *6785*.

(3) *Elliott* v. *Boynton,* [1924] 1 Ch. 236 ; 31 Digest 553, *7003* ; 93 L.J. Ch. 122 ; 130 L.T. 497.

(4) *New Zealand Shipping Co., Ltd.* v. *Société des Ateliers et Chantiers de France,* [1919] A.C. 1 ; 17 Digest 267, *801* ; 87 L.J.K.B. 746 ; 118 L.T. 731 ; *affg.,* [1917] 2 K.B. 717.

(5) *Jay's Furnishing Co.* v. *Brand & Co.,* [1915] 1 K.B. 458 ; 18 Digest 306, *424* ; 84 L.J.K.B. 867 ; 112 L.T. 719.

(6) *Rutter* v. *Everett,* [1895] 2 Ch. 872 ; 5 Digest 774, *6657* ; 64 L.J. Ch. 845 ; 73 L.T. 82.

Action for damages for illegal distress, by an owner of furniture comprised in a hire-purchase agreement and the subject of a distress by the defendant, the landlord of the premises in which it was being used. A second defendant was dismissed from the action at an early stage.

H. J. Wallington, K.C., and *T. F. Davis* for the plaintiffs.

H. J. Astell Burt and *B. M. Cloutman* for the defendants.

HUMPHREYS, J.: This was an action brought under the provisions of the Law of Distress Amendment Act, 1908, by an owner of furniture which was the subject of a distress by the landlord of the premises in which it was being used. It is unnecessary to refer in detail to the terms of the Act of Parliament, and the facts have been agreed. They may be summarised as follow: the defendant Hutchings is the landlord of certain premises occupied by one Johnson as the tenant. Johnson being in arrear with his rent, Hutchings was entitled to distrain upon his furniture. On July 7, 1936, Hutchings signed a warrant authorising the defendant Craggs, who is a certificated bailiff, to levy a distress. On July 8, Craggs duly levied that distress. Among the furniture then seized were some articles which were the property of the plaintiffs. Those goods had been subject to a hire-purchase agreement dated Jan. 17, 1936, made between the plaintiffs and Johnson. On July 14, the plaintiffs duly served upon the defendant a notice and inventory under sect. 1 of the Act. That notice was put in at the trial. It is a notice in the terms of the Act stating that the tenant Johnson has no right of property or beneficial interest in the furniture set forth in the inventory, and distrained upon, and that such furniture, goods and chattels are the property of the plaintiff company. That notice is dated July 14. On Sept. 23, the defendant sold those articles which were at all times the property of the plaintiffs. Upon those facts, the plaintiffs bring this action under sect. 2 of the Act, which provides, amongst other things, that if any landlord:

> shall, after being served with the aforementioned declaration and inventory . . . levy or proceed with a distress on the furniture, goods and chattels of the [other person who has served the notice, he shall be] deemed to be guilty of an illegal distress.

The action was therefore brought by the plaintiffs against the defendants for illegal distress.

By their defence the defendants rely upon sect. 4 of the Act, which is a section beginning with the words "This Act shall not apply," which words are followed by a number of circumstances in which the Act is not to apply. Those which are said to apply to this case are these:

> This Act shall not apply to goods comprised in any . . . hire-purchase agreement . . . made by such tenant nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof.

The plaintiffs contend that sect. 4 has no application to this case, by reason of one of the terms of the hire-purchase agreement in question. That is cl. 8, and that is the question which falls for my decision in this case. Clause 8 is as follows:

> Notwithstanding anything hereinbefore contained this agreement and the company's [the plaintiffs'] consent to the hirer's possession of the furniture comprised herein shall automatically determine and come to an end if any landlord of the hirer threatens or takes any step to levy a distress for rent upon the furniture of or in the possession of the hirer.

I am told that this case is regarded as of some importance, and I think that that may well be so. It is not disputed that cl. 8 of that agreement was inserted in the agreement, which in effect is the principal document, for the purpose of ousting the provisions of sect. 4 of the Act, and thereby protecting goods on hire-purchase which are in the possession of the tenant who is unable to pay his rent from being distrained upon for such unpaid rent.

That is not precisely the way in which Mr. Wallington puts the matter. He says that by virtue of cl. 8 the goods which had admittedly been subject to the hire-purchase agreement, and had admittedly been in the order or possession of the tenant with the consent of the true owner, ceased to be the subject of such agreement, and ceased to be retained by the tenant with the consent of the owner, on July 7, when Hutchings signed the distress warrant, and thereby, in the language of cl. 8, took a step to levy a distress. The position so created is obviously a slightly artificial one, but for all that it may be effective for the purpose for which it was intended.

Mr. Wallington relied upon the case of *Smart Bros., Ltd.* v. *Holt* (1). It is unnecessary to refer at any length to the report of that case. It is sufficient to say that the case, would, in my opinion, be conclusive in this matter if the plaintiffs had proceeded, not under cl. 8, as they did, but under another clause of the agreement, cl. 7 (*b*). Clause 7 (*b*) provides as follows:

> In case of any breach [of any of the terms of the agreement] the company [the plaintiffs] may by written notice sent by post or otherwise . . . forthwith and for all purposes absolutely determine and end this agreement and the hiring thereby constituted and thereupon the hirer shall no longer be in possession of the furniture with the company's consent nor shall either party thereafter have any right hereunder.

The terms of that clause are identical with the terms of the clause which appeared in the case of *Smart Bros., Ltd.* v. *Holt* (1). What happened in that case was—it was cl. 8 in that agreement—that the landlord gave that notice referred to in that clause, and the court held that thereby the agreement was effectively determined and became absolutely void, and that neither party had any right under it, and therefore that, when the distress was levied, which was more than a week after the notice had been sent, there was no hire-purchase agreement in force relating to the goods. Therefore, they were not at that time comprised in any hire-purchase agreement, and I think it must be taken, although the question does not seem to have been much argued, that, in those circumstances, the owner's consent to the tenant's retention of the goods which had been on hire-purchase ceased. In this case, in my opinion, that authority does not arise, for the reason that the proceedings taken by the landlord in that case were quite different from the proceedings taken in this case. The question here is not whether, if the true owner takes the steps indicated by the agreement, and thereby puts an end to the agreement, he is entitled to do so, which he obviously is, but whether, if the owner takes no steps, the agreement is automatically determined by virtue of a different clause in the agreement.

Mr. Astell Burt, with great industry, and with his usual ability, has taken a number of points, and I think it right to deal with each of the points that he has taken, so far as I have followed them. First of all, on the question of whether, in the language of sect. 4 (1), it is right to say that, at the date of the distress, these goods were "goods comprised in any hire-purchase agreement" made by the tenant. First of all, Mr. Astell Burt took the point that the agreement in question was not one which would affect the landlord, because he was not a party to it. It seemed at the time to be a courageous point to take, because, while, of course, it is perfectly true—it is elementary—that persons are not bound by the terms of an agreement to which they are not parties, it is equally clear, and indeed notorious, that the rights of persons are every day affected by agreements to which they are not parties. Indeed, it is not suggested in this case, and could not be, that, if certain steps had been taken by one of the parties to that agreement, the rights of the landlord would have been affected, although the landlord was no party to it. In support of that proposition, Mr. Astell Burt had discovered and cited to me a case of *Hickenbotham* v. *Groves* (2). I confess that I have had some difficulty in making up my mind as to how to deal with that case. It is, in fact, a report, not of any decision by a judge, but of a summing up by ABBOTT, C.J., to a jury, and the summing up of a judge to a jury is never intended to be a complete exposition of the law upon any subject. It is merely an indication to the jury of such legal matters as are necessary for them to understand in order that they, in their turn, may arrive at a true decision upon the facts. While I would not be presumptuous enough to doubt that the summing up was an admirable summing up for the purpose of that case, it relates only to the facts of that case. What is relied upon by Mr. Astell Burt mostly is a passage in the summing up. Referring to a deed which had been entered into, the judge made this observation: "Those were private contracts between these parties." I ought to say that the deed contained a clause that the plaintiff should resume possession of furniture if "Hodgson should commit any act of bankruptcy, on which any commission of bankruptcy should issue." ABBOTT, C.J., says, at p. 496:

> But those were private contracts between these parties, and being unknown to the world, they will not help the plaintiff, if you think that these goods were in the order and disposition of the bankrupt.

I think that it is sufficient to say with regard to that case that I cannot accept it as an authority, nor do I think that the judge for a moment intended that it should be regarded as an authority, for the proposition that, in such cases as the present, the right of the landlord to these goods should not be affected by an agreement entered into by persons who were unknown to him, and persons other than himself.

The case is one which, I am told, and I think rightly told, is not referred to at all in the leading book on bankruptcy cases, WILLIAMS ON BANKRUPTCY. The question of the consent of the party, and whether that consent was abrogated or not, does not seem to have been argued.

The next point which was taken by Mr. Burt is this: He says that, on the true construction of cl. 8 of this agreement, taking the agreement as a whole, the expression that the "agreement shall automatically determine and come to an end" does not make the contract void, but only voidable, and, of course, he adds that, if it is only voidable, there is, as is admittedly the fact here, no notice by one party to terminate the agreement. He relies for that proposition upon a series of Chancery cases dealing, in every case, with either a lease or such a matter as a licence to mine, and there is no doubt that the cases show in regard to the lease what was summed up, I think sufficiently, in a few words of the judgment of POLLOCK, M.R., in *Elliott* v. *Boynton* (3), at p. 246:

> But it is unnecessary to consider the precise words of, or construction to be placed upon the forfeiture clause, for in a long series of cases it has been determined that a provision that a lease shall be void on a breach of covenant or conditions by the lessee means that the lease is voidable only at the option of the lessor.

I accept that, with great respect, with regard to leases and licences, but I think, however, in regard to agreements, that the law is as stated by LORD ATKINSON giving his opinion in the House of Lords in the *New Zealand Shipping Co., Ltd.* v. *Société des Ateliers et Chantiers de France* (4). The passage is so illuminating that I think it is worth reading the whole of it, although only a part of it is directly applicable to the question that I have to determine. LORD ATKINSON said, at p. 9:

> It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract. The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event.

Applying those principles to this case, it seems to me to be clear that, while it would not have been in the power of the tenant Johnson to insist upon the avoidance of this contract because of his own breaches, and it is quite clear that he committed breaches of the contract, yet, in regard to the plaintiffs, who are described by LORD ATKINSON as the blameless parties, if they desire, they are entitled to have it held that the contract is void as the terms stand. That is my view. If, as between those two parties, the contract is, so long as the plaintiffs desire it, void, I cannot myself understand any principle of law, nor has any authority been cited to me, to support the proposition that it can be kept alive for the purpose of altering the rights of some third party.

The final point taken by Mr. Burt was this: He said that, if the whole of this hire-purchase agreement is taken and read, it will be found that, although by cl. 8 the contract is said upon the happening of a certain event to be automatically determined and to come to an end, and neither party is to have any right under it, yet in truth, as appears by other clauses, in particlar cl. 7 of the contract, other things remain to be done. In the case of *Smart Bros., Ltd.* v. *Holt* (1), to which I have referred, and in another case, *Jay's Furnishing Co.* v. *Brand & Co.* (5), which is referred to in *Smart Bros., Ltd.* v. *Holt* (1), it was held that, in those circumstances, a contract did not become absolutely void, but only voidable, and Mr. Astell Burt says that that applies to this case. The point is an attractive one, but I think that the true answer is that made by Mr. Wallington—namely, that in this case one must construe these clauses, dealing as they do with different events, separately, and that cl. 8 must be taken by itself, and that the court must first decide whether cl. 8 is effective, on the facts of this case, to put an end to this contract. If it is, then, by cl. 8, there is nothing further to be done. There is nothing left for either party to do. The mere fact that, by cl. 7, if different steps had been taken, there would have remained something for the parties to do, is no reason for saying that the contract is not coming to an end and is not automatically determined as provided by cl. 8.

On the point, therefore, made by Mr. Astell Burt, that the goods are still the subject of a hire-purchase agreement, I think that the plaintiffs are right. I now come to his other point. He said that, quite apart from the contract altogether, this is a case in which the goods were and remained in the:

> possession, order or disposition of the tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof.

For that proposition, he relied upon a series of cases which, I think, without exception were bankruptcy cases. It appears to be the fact that, since the reign of James I, all the Bankruptcy Acts have had in them a clause which I believe is identical in language—if there is any alteration in any of them, it is immaterial—with that used in the Law of Distress Amendment Act, 1908. Therefore, it follows, in my opinion, that the bankruptcy cases are material and relevant in this action. I think that Mr. Burt is right in saying that the whole series of cases cited in bankruptcy shows that, where goods are left by the true owner in the "possession, order or disposition" of another party, and where the true owner is subsequently saying, "That consent which I gave at first I afterwards retracted," that true owner must show that he took some steps to indicate that that was his intention, and probably he must show that he took some steps to recover the goods so that no person could, after that, say that the tenant was the reputed owner of the goods, as he had appeared to be up to that time. There are a few words in one of the cases to which I think it is sufficient to refer. That is the case of *Rutter* v. *Everett* (6). In the judgment of STIRLING, J., as he was then, there is this statement of the law, dealing with the case where there has been a disposition of goods by the true owner, which resulted in their being for a time, at all events, in the possession, order or disposition of another party with his consent and permission, at p. 878 :

> "How is the true owner to prevent the reputed ownership ? How can it be prevented otherwise than by notice to the person who is under liability in respect of the chattels ? The law has said this is the mode of preventing reputed ownership as to debts ; and is there to be one law as to debts and another as to legacies ? The plain object of the statute is, that the true owner shall not permit the order and disposition to remain with the bankrupt ; and if he does not take the steps which are necessary to prevent it, surely he must be taken to permit it."

In my opinion, that principle is quite inconsistent with the notion that consent of an owner which is clearly established up to a point is deemed to be, or can be deemed to be, withdrawn, when, in fact, no steps are taken by the owner to assert his right to the goods, and the goods are in fact left in the order and disposition of the tenant. For that reason, I have come to the conclusion in this case that the consent, which undoubtedly was given by the plaintiffs, to the goods being in the order and disposition of the tenant, so as to render him the reputed owner at the time when the hire-purchase agreement was entered into and the goods delivered, was never effectively determined, and that I cannot give effect to the statement in cl. 8 of the agreement so as to operate in the same way as would a notice or some other act by the true owner to determine that consent. For that reason, I think that the defendant has made out his defence here. I think that sect. 4 does apply, and it follows that my judgment must be for the defendant.

Judgment for the defendant, with costs.

Solicitors : *Lewis Lloyd & Co.* (for the plaintiffs) ; *R. H. King & Co.* (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CROSS (INSPECTOR OF TAXES) *v.* LONDON & PROVINCIAL TRUST, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Lord Romer and MacKinnon, L.J.), **December 3, 6, 1937, January 31, 1938.**]

Income Tax—Income arising from securities—Foreign bonds—Payment of interest suspended—Issue of funding bonds in place of interest—Sale of funding bonds—Liability to tax on proceeds of sale.

The Brazilian government suspended payment of interest on certain bonds and issued funding bonds to the holders thereof in place of interest over a period not exceeding 3 years. The respondent company, which held some of these bonds, sold the funding bonds which it received. The company was assessed to income tax under Sched. D, Case IV, upon the proceeds of sale :—

HELD : the issue of the funding bonds was the issue of a capital asset and not a payment of interest nor a payment of an equivalent of interest. There was accordingly no receipt of income by the respondent company, and the proceeds of sale of the funding bonds were not liable to tax.

Decision of FINLAY, J. ([1937] 3 All E.R. 840) *affirmed.*

[EDITORIAL NOTE. The issue of funding bonds in place of interest is here held to be a capitalisation of interest. It is to be noted that the bonds were only in place of interest over a period not exceeding 3 years, and that there would apparently have to be more or less regular issues of these bonds; but this is not thought to prevent the resulting capitalisation. It should also be noted that the funding bonds were bonds of the debtor who ought to pay the interest. Giving such a bond is not payment of the interest, but rather a promise to pay it in the future.

AS TO CAPITALISATION, see HALSBURY, Hailsham Edn., Vol. 17, pp. 252-254, paras. 511-517; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 662a-666a.]

Cases referred to:

(1) *Scottish & Canadian General Investment Co.* v. *Easson*, [1922] S.C. 242; 28 Digest 20, case *h*.

(2) *Income Tax Comr.* v. *Darbhanga* (*Maharajadhiraja*) (1933), L.R. 60 Ind. App. 146.

(3) *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (1905), 5 Tax Cas. 159; 28 Digest 23, case *b*.

(4) *Raghunandan Prasad Singh* v. *Income Tax Comr.* (1933), L.R. 60 Ind. App. 133; Digest Supp.

(5) *Royal Insurance Co., Ltd.* v. *Stephen* (1928), 44 T.L.R. 630; Digest Supp.; 14 Tax Cas. 22.

(6) *Westminster Bank, Ltd.* v. *Osler*, [1933] A.C. 139; Digest Supp.; 102 L.J.K.B. 110; 148 L.T. 41; 17 Tax Cas. 381.

(7) *Inland Revenue Comrs.* v. *Lawrence, Graham & Co.*, [1937] 2 K.B. 179; [1937] 2 All E.R. 1; Digest Supp.; 106 L.J.K.B. 772; 157 L.T. 219.

APPEAL by the Inland Revenue from the decision of FINLAY, J., given on July 30, 1937, and reported in [1937] 3 All E.R. 840.

The Attorney-General (*Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellant.

A. M. Latter, K.C., and *J. S. Scrimgeour* for the respondents.

SIR WILFRID GREENE, M.R.: The respondents were the holders of certain gold bonds issued by the United States of Brazil. The bonds were dollar bonds with interest coupons annexed which were payable in dollars in New York, or at bearer's option in London in sterling, at a conventional rate of exchange. In Mar., 1932, a circular was issued on behalf of the Brazilian government, giving notice that it was compelled to suspend payment of interest on these bonds, and stating its decision to fund the interest during a period not exceeding 3 years. This funding operation was to be carried out by the issue of 20-year funding bonds, carrying interest at 5 per cent., which were to be issued in exchange for coupons of a like nominal amount as they matured. The respondents surrendered the coupons on their bonds as they fell due, and received funding bonds in exchange. These bonds had a value in the market at the date of receipt. The funding bonds contained a promise by the Brazilian government "for value received" to pay to the bearer on Oct. 1, 1951, the nominal amount appearing on the face of the bond (described as "the principal sum"), unless the bond had previously been redeemed, and a promise to pay interest on the said principal sum at the rate of 5 per cent. per annum. Both principal and interest were payable in New York or London at bearer's option. The bonds were expressed to have been issued pursuant to a "general bond" of Oct. 1, 1931, under which they were entitled to the benefits of an accumulative sinking fund, commencing in 1934, which was to be applied in the purchase of bonds below par or in redemption at par by semi-annual drawings. Attached to the bonds were interest coupons.

The "general bond" contained undertakings by the Brazilian government to provide the paying agents with funds necessary for the interest and sinking-fund service of the funding bonds. Clause 8 (*b*) of the general bond provides that the holder of a coupon of the original bonds which is not exchanged for funding bonds is to be entitled, on presentation of the coupon at the office of the paying agents, to receive a sum equal to the principal value of the funding bonds which might have been issued in exchange for such coupon, together with accrued interest. This right is exercisable on or after Oct. 1, 1951, or on earlier dates, provided that on those dates there are funds in the hands of the paying agents sufficient to redeem all funding bonds then either outstanding or liable to be issued. The respondents from time to time sold the funding bonds which they had received. For the years 1933-34 and 1934-35 the respondents were assessed to income tax under Case IV of Sched. D in sums intended to represent the value as at the dates of issue of certain of the funding bonds received and sold by them. The respondents successfully challenged this assessment before the special commissioners, whose decision was upheld by FINLAY, J. The Crown appeals.

The question involved can be stated in a few words. It is this: Were the funding bonds, when received, "income arising from securities outside the United Kingdom"? The Crown says that they were money's worth received in satisfaction of interest payable under the original bonds. The respondents say that they have received no income from those bonds, in that all that they have received is a substituted promise to pay the interest at a future date, with interest thereon in the meantime. It is not open to question that income can be in the form of money's worth. Nor is it open to question that, if the holder of a security, the contractual income from which is money, receives from the person liable to pay that money something of money's worth (e.g., goods) instead of the money, such goods are income arising from the security: cf. *Scottish & Canadian General Investment Co.* v. *Easson* (1), where debentures of a new company were received in place of interest due on bonds issued by an old company. On the other hand, where there is a mere substitution of a promise to pay at a later date for the obligation to make an interest payment presently due, the owner of the security cannot be said to have received income from it. In such a case, in truth, that is exactly what has not happened, since the payment has been postponed, instead of being made on its due date. Nor do I see how it can make any difference if, upon the true reading of the transaction, the original obligation is extinguished, and the promise to pay at a later date is accepted in its place. If the holder of a mortgage agrees to accept a post-dated cheque in lieu of interest which has accrued due, it would surely be a misuse of language to say that he had received income from the mortgage, and that notwithstanding the fact (which I will assume) that the post-dated cheque was a thing of money's worth. A question of this nature arose under the Indian Income Tax Act in *Income Tax Comr.* v. *Darbhanga* (*Maharajadhiraja*) (2). There, under an arrangement between debtor and creditor, the creditor took from the debtor, in satisfaction of principal and interest due, certain assets, and also certain promissory notes of the debtor himself, a sufficient number of which were held to be properly referable to the interest due. It was held by the Privy Council that the receipt of these notes could not be treated as the receipt of income. LORD MACMILLAN, in delivering the judgment of the Judicial Committee, said, at p. 161:

> There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and that a receipt in kind may be taxable income. But for this to be so, it is essential that what is received in kind should be the equivalent of cash or, in other words, should be money's worth: *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (3) and *Scottish & Canadian General Investment Co.* v. *Easson* (1), both cited by DAS, J., below. Now here, the first six items, amounting to 20,74,973 rupees, may perhaps reasonably enough be regarded as the equivalent of cash, but the seventh item of 17,34,596 rupees, consisting of the debtor's own promissory notes, was clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far then as this item of 17,34,596 rupees is concerned, the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all.

On the same day, the judgment of the Judicial Committee was delivered by LORD MACMILLAN in another case, that of *Raghunandan Prasad Singh* v. *Income Tax Comr.* (4). There the assessees, who were holders of a mortgage on which interest was in arrear, accepted, in discharge of that mortgage and all sums due thereunder, a new mortgage for a principal sum, part of which represented the arrears of interest due under the old mortgage. The grantors of the new mortgage were not identical with the grantors of the old mortgage, and the property mortgaged was greater in extent. The assessees claimed that the acceptance of the new mortgage and the extinction of the old mortgage operated as payment of the arrears of interest, with the result that the amount of those arrears ought to have been brought into charge in the year in which the new mortgage was accepted. The judgment, after examining the decisions in *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (3), *Royal Insurance Co., Ltd.* v. *Stephen* (5), and *Westminster Bank, Ltd.* v. *Osler* (6), summed up the result in the following words, at p. 138:

> From these cases it is plain that the essence of the matter is that there must be an actually realised or realisable profit or loss.

It then proceeds to point out that, in receiving the new mortgage, the assessees "did not thereby receive payment or the equivalent of payment of the principal and interest of the original mortgage," and that, notwithstanding that the mortgagors and the property mortgaged were not identical,

> the substitution effected cannot in any real sense be described as the equivalent of a realisation of the original mortgage, principal and interest. What happened was that the assessees received a new and substituted security for an existing debt. To give security for a debt is not to pay a debt. If the assessees had received payment in kind of the amount outstanding on the original mortgage, in the shape, say, of realisable shares or bonds, the case would have been different, but they merely received further and better security for their debt. It is, in their Lordships' view, quite immaterial that the assessees discharged the original mortgage and all liability under it, for that was merely an incident in the transaction whereby the new security was substituted for the old.

It is clear that the "realisable shares or bonds" referred to in this passage are shares or bonds issued by some company, since the assessees were individuals, and the expression, therefore, could not refer to some such security issued by them. It is to "realisable" things of this character that the phrase "realisable profit or loss," in the passage first cited from the judgment, clearly refers.

It is to be observed that this case is a much stronger case than that of the post-dated cheque, or that of the notes of hand, dealt with in the earlier case. The essential fact was that the new mortgage was given to secure the existing debt, and could not be regarded as payment of that debt, as would have been the case if something "realisable" or "the equivalent of cash" had been given to the creditor.

I have quoted the language of this latter case because much of the reasoning which it contains is applicable to the present case. Neither decision is, of course, an authority binding on this court, and I wish respectfully to reserve for consideration whether, if a case similar to the second of the two cases were to arise under the English Income Tax Acts, the circumstance that the mortgagors under the substituted mortgage were not the same as those under the original mortgage might not be of importance. But, subject to this reservation, I respectfully agree with the reasoning upon which these two decisions are based. A security produces the income appropriate to it. The income appropriate to a money bond is money. The parties may agree to substitute something different as income of the security, and the thing so substituted (e.g., goods) thereupon becomes the appropriate income of the security. But, where the debtor defaults, and the appropriate income, being money, is not changed into something else, but remains money which the debtor promises to pay at a later date, it does not appear to me to be possible to say that the security has produced any income, since the income which the security was intended to provide has not been provided. This circumstance is not affected by the facts that (as in the present case) a new undertaking to pay is given, that such new undertaking is in a form which can be conveniently dealt with on the market, or that such new undertaking may contain provisions intended to give better security for the money due. The inescapable fact remains that the interest due on the original bonds held by the respondents has not been paid.

All the arguments put forward on behalf of the Crown really come down to the same thing—namely, that, *because* the funding bond was of money's worth, it *therefore* follows that the respondents, in receiving it, received an income profit. But this proposition will not bear examination. It involves the assumption that, whenever the holder of a security receives from that security money's worth, he receives income, and this is not the case. It is one thing to say that income is none the less income because it is received in the shape of money's worth instead of money: this proposition is true. It is a totally different thing to say that the receipt of money's worth is necessarily a receipt of income; this proposition is not true. When a bond is issued, with coupons attached, the coupons are money's worth—they can be sold before maturity under discount—yet it could not be suggested that, in receiving the coupons, the holder of the bonds had received income. Again, when the coupons originally attached to the bond have all been paid, and the holder of the bond sends in the talon, and receives a new set of coupons, he receives money's worth, for the coupons are of value. But he does not for that reason receive income. Again, in the case which I have given of the post-dated cheque, the cheque is money's worth, but it is most certainly not income. In all these cases, the appropriate income of the security is money, and remains money. There is no substitution of some other form of income for money, and, unless and until the security has produced money, or something substituted for money, it has not produced income. In the present case, the form of the funding bond, and the fact that it is a marketable security, tend to conceal the fundamental *petitio principii* which underlies the Crown's argument. There were no doubt sound commercial reasons for issuing a document of this kind. But, when its true nature is considered, it is nothing but a promise to pay at a future date the interest in respect of which default has been made. The fact that the promise to pay this interest takes the form of a marketable instrument appears to me to be irrelevant. The coupon itself presumably had some value before the default. If the funding bond has more value than the coupon had, that merely means that the debtor's promise to pay embodied in it is of more value than his original promise to pay. It does not mean that he has paid, for he has not. The tree has produced no fruit, to use a well-worn simile. The owner of the tree has refused to allow it to be picked, and has merely given a voucher entitling the holder to pick it at a future date.

Of the authorities referred to in the course of the argument, there is only one to which I think it necessary to refer—namely, the case of *Inland Revenue Comrs.* v. *Lawrence, Graham & Co.* (7). In that case, under the provisions of a mortgage deed, on default of payment of any half-year's interest "the sum due in respect of the half-year's interest so unpaid" (which in point of construction was held to mean the net sum after deduction of tax) was to be converted into principal money and added to the amount of the loan. Default took place, the provisions of the mortgage deed took effect, and, upon a subsequent sale by the mortgagees, their solicitors, who received the purchase money, paid over to the mortgagees (together with other moneys) a sum of £2,378 19*s.*, representing the net interest capitalised, and paid the balance to second mortgagees. The Crown claimed that, on paying this sum of £2,378 19*s.* to the first mortgagees, the solicitors were paying interest within the meaning of r. 21 not payable out of profits or gains brought into charge, that upon such payment they were bound under that rule to deduct tax, and that they were assessable in a sum equal to the gross amount of the interest. The real question which arose was whether, having regard to the terms of the mortgage deed, when properly construed, the mortgagor had deducted tax on each occasion when the interest was capitalised, and it was held that he had done so. By the terms of the contract itself, providing as it did for capitalisation of the net amount, the capitalisation was treated by the parties as a payment in account as between mortgagor and mortgagee—the fact that the sum to be capitalised was a net sum inevitably produced this result. This case, which turned upon the effect as between the parties of a particular provision in the original contract, is not, in my opinion, of any assistance in the decision of the present question. In the present case, a defaulting debtor, instead of paying the interest due, has repudiated its obligations. This appears from the opening words of the circular referred to at the beginning of this judgment. It offered to its creditors a promise of deferred payment, the acceptance of which (and there was no alternative) cannot, in my opinion, upon the facts, be treated as though it were payment. In the result, I am in agreement with the decision of the judge, and this appeal must be dismissed with costs.

I am authorised by LORD ROMER to say that he has read the judgment which I have just delivered, and that he agrees with it, and has nothing to add.

MACKINNON, L.J.: The respondents were the holders of certain gold bonds issued by the United States of Brazil. The bonds had interest coupons attached, which were payable either in dollars in New York or in sterling in London. So long as the bonds were honoured and the coupons were paid, of course, the respondents were liable for income tax under Sched. C.

In Mar., 1932, the Brazilian government announced that it could not pay the interest on the bonds. In lieu of doing so, it offered in exchange for each coupon to issue 20-year funding bonds, bearing interest at 5 per cent. In other words, instead of paying the interest due on the original bonds, it offered to pay in Oct., 1951, and to add interest on the amount at 5 per cent. per annum, payable by coupons on the funding bonds. The respondents, having received funding bonds in exchange for their gold-bond coupons, sold the funding bonds from time to time. In respect of the moneys received from such sales, they have been assessed to income tax under Case IV of Sched. D, it being alleged that the moneys A received were "income arising from securities outside the United Kingdom." The "securities," of course, are the original gold bonds, not the funding bonds. The whole funding bond together with its interest coupons was in each case sold. There was, therefore, a foreign security, on which interest was payable, which interest, if paid, would B constitute income from a foreign security. The debtor, having refused to pay the interest, issued a document promising to pay it in 20 years' time. The promise in this document being assignable, it was saleable, and was sold. The question is whether the money realised from the sale of this promise to pay *in futuro* the interest on the security can properly C be said to be "income from the security."

I agree with FINLAY, J., in thinking that the answer to this question must be in the negative. It is important to realise clearly the essential nature of this transaction, and that is apt to be obscured by the fact that what the debtor handed over in lieu of payment was a document possess- D ing the character of a marketable security. The essential nature of the transaction was that the debtor, avowing his inability to pay what had fallen due, gave instead his written promise to pay at a future date. He might just as well have given his own post-dated cheque. Or, still more simply, he might have written on each of the gold-bond coupons E a promise to pay it in 20 years, with interest annually until payment. It is quite true that income may arise by the receipt of money's worth as well as by the receipt of money, and it is equally true that a debtor may pay his debt by giving the promise of a third party to pay. Indeed the best form of payment in the world, Bank of England notes, if sub- F jected to the unusual treatment of being read, will be found to be promises by a third party to pay. But I am satisfied that there can never be payment of his debt by a debtor by giving his own promise to pay at a future date, and I am equally satisfied that, though income arises to a creditor from a debtor's paying his debt, income does not arise by the G debtor's promising that he will pay his debt later on. This appears to be precisely the reasoning of the Privy Council in *Income Tax Comrs.* v. *Darbhanga* (*Maharajadhiraja*) (2). LORD MACMILLAN there said, at p. 161:

> . . . the seventh item . . . consisting of the debtor's own promissory notes, was H clearly not the equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document . . . possessing certain legal attributes. So far then as this item . . . is concerned the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all.

To which I would add, so as to include the further incident that occurs in this case, that, if the debtor cannot be said to have paid his creditor

by giving him his promissory note, equally he cannot be said to have paid his debt when the creditor realises some money by assigning the promissory note to a third party. And, as the creditor does not receive payment from his debtor when he receives his promissory note, nor does "income arise" from that receipt, so equally he does not receive payment, or acquire income, when he sells the promissory note for what it will fetch. A
I agree, therefore, that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted on terms.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Linklaters & Paines* (for the respondents). B

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

TELSEN ELECTRIC CO., LTD. *v.* J. J. EASTICK & SONS (No. 2).

[King's Bench Division (Lawrence, J.), **January 17, 1938.**] C

Practice—Decision given by a judge on principle—Amount referred to referee—Application to set aside referee's decision—Jurisdiction of single judge—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *ss.* 88, 89, 90 (2)—*R.S.C., Ord.* 59a, *r.* 1.

It was held in an action that an agreement for the sale of the plaintiff's business constituted a breach of an agreement by a receiver to maintain prices. An inquiry with regard to damages was directed to a named person. It was contended that the reference was a reference under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89, and not under sect. 88:— D

Held: (i) as the reference was one to decide only the amount of the claim, it did not fall within sect. 88, but within sect. 89, of the Act of 1925. E

(ii) any application to set aside the award under such a reference must be made to the Divisional Court, and not to a single judge, since the words "or a judge" in sect. 90 (2) do not refer to a single judge of the King's Bench Division, but were inserted to give effect to the practice in the Chancery Division. F

[EDITORIAL NOTE. It has been thought that the word "judge" in sect. 90 (2) of the 1925 Act meant a judge of the King's Bench Division sitting in court or in chambers, and that the subsection gave him power to set aside an award, but in practice such applications were always made to the Divisional Court. It is now decided that such applications must be made to a Divisional Court.

As to References under Order of Court, see HALSBURY, Hailsham Edn., Vol. 1, pp. 682-685, paras. 1135-1137; and for Cases, see DIGEST, Vol. 2, pp. 616-619, Nos. 2458-2473. See also YEARLY SUPREME COURT PRACTICE, 1938, pp. 1710, 1711.] G

Case referred to:

(1) *Cooke* v. *Newcastle & Gateshead Water Co.* (1882), 10 Q.B.D. **332**; 2 Digest 617, *2464*; 52 L.J.Q.B. 337. H

Application to set aside the award of a special referee. The trial of the action is reported in [1936] 3 All E.R. 266. Lawrence, J., having decided the principle governing the matter, directed an inquiry before Mr. Latham as to damages. The present application is to set aside the award of Mr. Latham, but this report is concerned only with the preliminary point whether this application should be made to a single judge of the King's Bench Division or to a Divisional Court.

The Supreme Court of Judicature (Consolidation) Act, 1925, ss. 88, 89, 90 (2), are as follow:

> 88. (1) Subject to rules of court and to any right to have particular cases tried with a jury, the court or a judge may refer to an official or special referee for inquiry or report any question arising in any cause or matter, other than a criminal proceeding by the Crown. (2) The report of an official or special referee may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.
>
> 89. In any cause or matter, other than a criminal proceeding by the Crown, (*a*) if all the parties interested who are not under disability consent; or (*b*) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers; or (*c*) if the question in dispute consists wholly or in part of matters of account; the court or a judge may at any time order the whole cause or matter or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court.
>
> 90. (2) The report or award of an official or special referee or arbitrator on any reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury.

A. T. Miller, K.C., and *Valentine Holmes* for the plaintiffs.

R. P. Croom-Johnson, K.C., and *A. A. Gordon Clark* for the defendants.

LAWRENCE, J.: I have very reluctantly come to the conclusion that the argument presented on behalf of the plaintiffs is right. The application which is made to me is to set aside a decision of Mr. Latham, the liquidator of the plaintiff company, to whom the matter was referred by consent of the parties after a hearing before me. The consent of the parties was expressed in the terms which are set out in the first paragraph of Mr. Latham's decision. The matter is now brought back to me, and the defendants contend that I am entitled under the Judicature Act, 1925, s. 90 (2), or under the general powers of the court, to set aside this decision of Mr. Latham's.

It is argued for the defendants, in the first place, that the reference to Mr. Latham was under the Judicature Act, 1925, s. 88, for his inquiry or report as to what the damages should be, and that it does not fall under sect. 89 at all, and that, if it does fall under sect. 88, the preliminary objection which the plaintiffs have raised—that I have no jurisdiction to deal with this decision of Mr. Latham—does not arise. The question that I have to decide, in the first instance, is whether the reference to Mr. Latham was a reference under sect. 88 of the Act of 1925 or under sect. 89 of the Act of 1925, or a reference altogether apart from those sections. If it was a reference altogether apart from those sections, in my opinion the contention of Mr. Valentine Holmes would be correct—namely, that the matter would have to go to the Divisional Court, because the decision of Mr. Latham would be an award. I am unable to take the view that the reference to Mr. Latham was under sect. 88.

The words of the agreement upon which I ordered the matter to be referred to Mr. Latham were that I should decide the questions of principle and that Mr. Latham should decide the amount for which the defendants should be admitted to prove in the liquidation. That word "decide" seems to me to be inappropriate to the cases dealt with by sect. 88 of the Act of 1925 and appropriate to the cases dealt with by A
sect. 89. Therefore, in my opinion, the reference falls within sect. 89.

It was then argued on behalf of the defendants that, even if the reference falls within sect. 89, sect. 90 (2) gives a single judge of the King's Bench Division power to set aside the award of a special referee under sect. 89, and my attention has been called to the decision of HAWKINS, J., in B
Cooke v. *Newcastle & Gateshead Water Co.* (1), which was decided upon the Judicature Act, 1873, s. 58, and in which he held that the Divisional Court alone had jurisdiction under that section. That section is in the same terms, so far as material, as is sect. 90 (2), except that it does not contain the words "or a judge," and it was argued that the introduction C
of those words in the Arbitration Act, 1889, s. 15 (2), indicated the intention on the part of the legislature that the award of a special referee might be set aside by a single judge and not by the Divisional Court. Mr. Valentine Holmes has contended that the only meaning of the introduction of those words, "or a judge," is really to specify the practice D
which obtains in the Chancery Division, and that it is not intended by sect. 90 (2) to confer any new jurisdiction upon the King's Bench Division, but that it simply has reference to the court which is appropriate to deal with the matter in accordance with the rules and orders of the court. By R.S.C., Ord. 59A, it is provided: E

> There shall be a right of appeal from any finding, decision, order or direction and from any judgment entered or signed by leave, order or direction of a special referee in any action, cause or matter or question or issue referred to him for trial or decision and from any assessment or award of damages by him.

It is also provided that that appeal lies in the Chancery Division to a F
judge and in the King's Bench Division to a Divisional Court. The words of R.S.C., Ord. 59A, r. 1, are sufficiently wide to apply to any decision of a special referee under the Judicature Act, 1925, s. 89. It appears to me that that is the true reading of sect. 90 (2), and that those words, introduced as they were by the Arbitration Act, 1889, really had reference to G
the Chancery Division, and did not have the effect of conferring upon the King's Bench judges a jurisdiction co-ordinate with that which is now conferred upon the Divisional Court by R.S.C., Order 59A, r. 1.

For these reasons, I am of opinion that the preliminary objection to my dealing with this matter succeeds. I hold that the reference was a H
reference under sect. 89, and that the only appeal in respect of that section is to the Divisional Court. I very much regret having to come to this decision, as it appears to me that there has already been a lamentable expenditure of costs in a case where a company in liquidation is conducting litigation.

On the question of costs, I now give the costs of the hearing before me to the defendants, with the exception of the costs of the amendment; and I suppose that the plaintiffs must have the costs of the hearing before me on this occasion.

Solicitors: *Herbert Oppenheimer, Nathan, Vandyk & Mackay* (for the plaintiffs); *Monier-Williams & Milroy* (for the defendants).

[*Reported by* GERALD ABRAHAMS, ESQ., *Barrister-at-Law.*]

Re CONSETT IRON CO., LTD.'S, APPLICATION.

[RAILWAY AND CANAL COMMISSION (Finlay, J., Sir Francis Taylor, K.C., Sir Francis Dunnell), **January 12, 13, 14, 19, 1938.**]

Mines—Ancillary rights—Right of way—Right previously enjoyed under lease—Terms found to be too onerous—Lease determined by colliery owner—Mines (Working Facilities and Support) Act, 1923 (*c.* 20), *s.* 3—*Mining Industry Act*, 1926 (*c.* 28), *s.* 13 (2)

Collieries required for their proper working a right of way along a strip of land for the removal of coal. They had enjoyed such a right under a lease upon terms which had been found in a previous action to be unreasonable. This lease was determined on Dec. 31, 1936. Any renewal of the grant was offered only on terms which were held to be unreasonable. It was contended that, as the applicants had put an end to their existing rights, any inability to obtain these rights was self-induced, and not within the provisions of sect. 3 of the 1923 Act:—

HELD: (i) the applicants were entitled to determine, and justified in determining, the lease, and were entitled to a grant of the right of way.

(ii) the compensation payable for the grant could not be based on the rent previously paid, for that had been held to be unreasonable, and was rightly based upon the agricultural value of the land.

[**EDITORIAL NOTE.** The main contention here was that the colliery owners, having enjoyed the right of way they wanted under a lease, and having determined that lease, were not entitled to apply under the Act of 1923 for a grant of the same right of way. This, however, is held not to be the case where the terms on which the grant was enjoyed have been held to be unreasonable.

AS TO GRANTS OF ANCILLARY RIGHTS, see HALSBURY, Hailsham Edn., Vol. 22, pp. 679-681, paras. 1457, 1458; and FOR CASES, see DIGEST, Vol. 34, pp. 635, 636, Nos. 321-327.]

Cases referred to:

(1) *Re Lucas & Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; 11 Digest 127, *169*; 77 L.J.K.B. 1009; 99 L.T. 767.

(2) *Inland Revenue Comrs.* v. *Clay, Inland Revenue Comrs.* v. *Buchanan*, [1914] 3 K.B. 466; 39 Digest 226, *63*; 83 L.J.K.B. 1425; 111 L.T. 484.

APPLICATION by the Consett Iron Co., Ltd., under the Mines (Working Facilities and Support) Act, 1923, for the grant of a right of way for a period of 99 years from Jan. 1, 1937, at a fixed rent of £10 per annum per acre over certain land between Garesfield Colliery and Derwenthaugh. The applicants had previously had a wayleave over this land under a lease dated Aug. 15, 1890, under which they paid a tonnage rent equivalent to an annual rent of £142 per acre. In a previous application to the court, the applicants alleged that such rent was unreasonable, and the Railway and Canal Commission granted wayleave rights at an inclusive annual rent of £10 per acre, but that grant was set aside by the Court of Appeal on the ground that the Act of 1923 gave no power to vary the financial terms of the existing lease. The applicants then determined the existing lease by a twelve-months' notice expiring on Dec. 31, 1936, and, in applying for a grant of such rights under the Act, alleged that it was impracticable to obtain those rights by private treaty otherwise than at an unreasonable rent, and that the reasonable rent for such rights was £10 per annum per acre.

The respondents alleged that the rents and conditions of the lease were not unreasonable at any time in the past, that they would not be unreasonable at any time in the future, and that it was not a matter of national interest that the application should be granted.

Sir Stafford Cripps, K.C., H. V. Rabagliati, K.C., and *J. P. Ashworth* for the applicants.

Sir Walter Monckton, K.C., and *David Bowen* for the respondents.

Finlay, J.: This matter is one which has been already before this court. There was an application under the Mining Industry Act, 1926, s. 13 (2). That application was made by the present applicants and was against the present respondents and another. On Apr. 16, 1934, this court gave judgment allowing that application. That judgment was, on Mar. 15, 1935, reversed by an order of the Court of Appeal. The case on appeal is reported in [1935] 2 K.B. 42. The court there were not unanimous. Slesser and Roche, L.JJ., took one view, and Greer, L.J., dissented. The ground upon which the majority decided—and we are bound by it—was that the word " impeding " in the section had reference to physical impeding only, and did not apply to financial terms and conditions. The result of that is that, of course, there was no judgment of this court, because the Court of Appeal held that there was no jurisdiction to give such a judgment; but it remains true that unanimous findings of fact were made by this court, and to those findings I shall have to return.

A series of letters, which disclosed very clearly the present state of affairs, has passed between the parties, and is now before us. It is not necessary to go through the letters in detail. The correspondence begins with a letter of Dec. 28, 1935, which intimates that the Consett Iron Co., Ltd., the applicants, desire to terminate their tenancy, and a notice was accordingly sent. There is also a letter from the respondents' solicitors to the applicants' solicitors in which they say:

> Our clients do not desire that the tenancy under which your clients use our clients' parts of the waggonway should be ended and they are willing to grant a lease to your clients of those parts for a term of 100 years upon the conditions applicable to the subsisting tenancy save that they will waive the lump sum paid in lieu of the render of free coal for Axwell Park.

That means that the respondents were saying that, with a variation not at all important, they were insisting upon the same terms as those that were in the subsisting lease, terms which had been found by this court to be unreasonable. To that there is a reply, dated Feb. 18, 1936, in which the applicants' solicitors say that they are of opinion that the terms should not take the form of a mere revival or extension of the subsisting tenancy. The applicants' solicitors, under date Mar. 5, 1936, write asking for a definite reply to their request with reference to the terms upon which the grant of facilities might be made. That is answered by the respondents' solicitors, who say that their clients are not willing to grant the right required upon the terms of the order of the Railway and Canal Commission, but that they are prepared to consider any reasonable proposals "which your clients may desire to submit." There is a further letter from the respondents' solicitors in which they say:

> Our clients still contend as they have done all along that the right basis for compensation is that of the Lands Clauses Acts and they would be prepared to negotiate for a new lease with payment of compensation on that basis or for a sale at an agreed number of years purchase of such compensation.

That letter I have considerable difficulty in understanding. The Lands Clauses Acts and the cases under those Acts may or may not be useful by way of analogy, but it seems impossible to say, as is there said, that the right basis for compensation is the Lands Clauses Act. The right basis for compensation must inevitably be the basis which is indicated by the Act itself under which the parties were proceeding.

There are two other letters to which reference must be made, but the next thing to observe is that the notice expired at the end of 1936, and it accordingly resulted that the then-subsisting lease was determined. In that state of affairs, there are two letters which have to be looked at. There is the letter of Jan. 1, 1937, from the applicants' solicitors, in which they point out, as was the fact, that the right to use the wayleave formerly enjoyed had expired. Then they ask with reference to the future what is to be done, and they say:

> In the meantime, to avoid closing our clients' mines and the consequent dismissal of their workmen, we shall be glad to have your assurance that our clients may continue in occupation until the matter has been disposed of, without prejudice to the rights of either party, it being clearly understood that our clients are not holding over on the terms of the expired lease.

That was answered on Jan. 9, 1937, by the respondents' solicitors:

> With reference to the fourth paragraph of your letter of the 1st instant, our clients have no desire or intention to prevent your clients' user of the waggonway and are prepared to acquiesce in the legal relation subsisting between themselves and your clients by virtue of your clients holding over, pending the result of continued negotiations between the parties, or the result of your intended application to the Board of Trade.

On those letters, and on the position which had arisen as a result of the notice having expired and the lease being thus terminated, there was some discussion before us as to what the exact position was; but it was not contended—indeed, clearly it could not be contended—that the effect was that there was a holding over on the terms of the lease. This being so, it seemed to us to be of little importance whether the true view was that there was a tenancy on sufferance (as it is called, perhaps not very accurately), or that there was a tenancy at will. If it were necessary, as it is not, to express an opinion about that, I should have thought that it was a tenancy at will, because the essence of a tenancy on sufferance, as I understand it, is that there is no consent of the landlord to the position created. Here it is clear that the landlords did consent, and I should have thought, therefore, though I regard the matter as quite unimportant, that the position at the moment is a tenancy at will. In these circumstances, the present application was made to use the strips of land in question, and for rights of wayleave for a period of 99 years, at a fixed annual rental of £10 an acre.

With regard to the facts of the case, I have not dealt with them at all so far, and, indeed, it is not necessary that I should deal with them at length, because they have been dealt with elaborately and correctly in the judgments of this court in the former case. For myself, I am prepared, as I shall indicate in a few moments, to adopt the judgment which was then delivered by MacKinnon, J. It is proper, however, just to mention that the position is quite clearly seen from a plan which was much used before us—Plan No. 3, it was called. It shows this colliery and, in green, the strips of land which were in the possession of the present respondents, the Clavering Trustees [shown on attached plan as between points VI-VII, VIII-IX, XI-XII, XIII-XIV].

There were before us two respondents—Clavering and Towneley—but an arrangement has happily been made with the Towneley Trustees. No arrangement proved possible with the Clavering Trustees, and perhaps the correspondence which I have gone through indicates the reason why that arrangement could not be made. For the reasons I have indicated, I do not propose to go into any detail. It is sufficient to say that there are several collieries which are worked by the applicants, and that the wayleave extends over a long strip some miles in length, and that several separate pieces of the land over which the wayleave extends are on the land which belongs to the Clavering Trustees. The details are perfectly well seen on the plan, and I do not propose to waste time by going through them. At the other end (so to speak), to the right of the plan, is the River Tyne, and the position is that on that river there are staiths—they have been elaborately made by the applicants—and their coal can be shipped. It is proper to mention also, so that I may not be thought to have overlooked it, that not merely the coal from these collieries but also coal brought by the London and North Eastern Railway, which has a branch there, is shipped, and shipped over a part of the wayleave in question, by being brought up to and by joining the railway, and by then going down to the River Tyne.

Before coming to the actual decision to which I am going to call attention, it is convenient to look briefly at the statute because it is important

Cultivation References

A.	Arable.
L.	Lea
M.	Meadow.
O.P.	Old Pasture.
P.	Pasture.

PLAN No. 3.

Ownership	Mileage	Acreage
Clavering. VI-VII VIII-IX XI-XII XIII-XIV	1·966	11 92.
Towneley. (Now Consett Iron Co. Ltd. V-VI X-XI	1·248	15·67
	3·212	27·59
Woods & Forests. III-IV	·778	5·00
Lord Ninian Stuart. VII-VIII IX-X	1·401	12·62
Consett Iron Co. Ltd. IV-V XII-XIII	1·691	10·00
	3 870	27·62
Total length of railway. & area	7·082	55·21
Whittonstall Tramway.		
J. F. Laycock. I-II	·202	
Consett Iron Co. Ltd. II-III	1·838	
Total.	2·040	

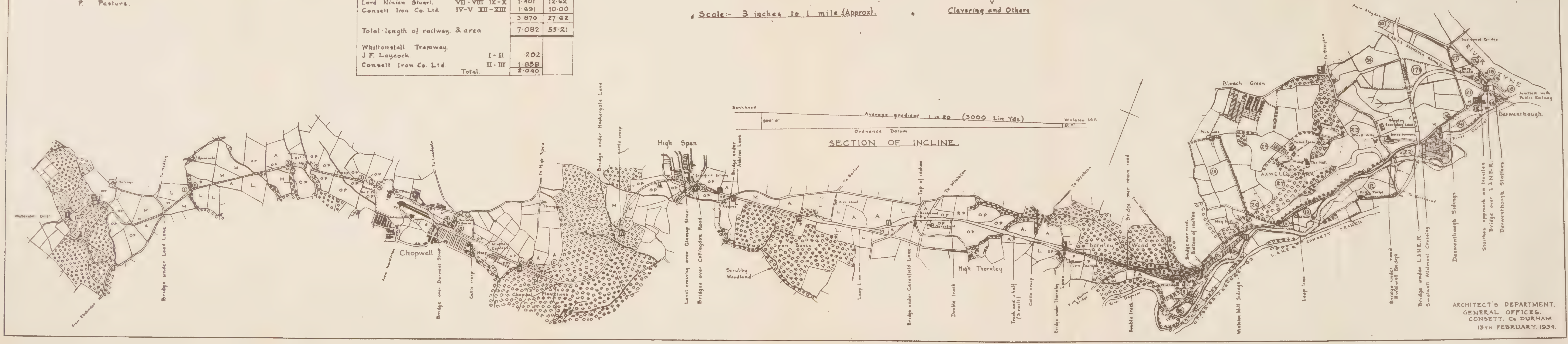
CHOPWELL & GARESFIELD RAILWAY.

Scale:- 3 inches to 1 mile (Approx).

(1) In the Court of the Railway and Canal Commission.

(2) The matter of the Mines (Working Facilities and Support) Act, 1923 and 1925.

(3) The Consett Iron Co., Ltd.
v
Clavering and Others



Bankhead
300' 0"
Average gradient 1 in 20 (3000 Lin Yds)
Winlaton Mill
Ordnance Datum
SECTION OF INCLINE.
Whittonstall Drift
From Ebchester
To Hedley
Bridge under Lead Lane
To Leadgate
From Hamsterley
Chopwell
Bridge over Derwent Street
Cattle creep
Allotment Gardens
Chopwell Plantations
To High Spen
Bridge under Hookergate Lane
Cattle creep
High Spen
Garesfield Colliery
Level crossing over Glossop Street
Bridges over Collingdon Road.
Bridge under Ashtree Lane
Ashtree
Scrubby Woodland
Spen Banks
To Barlow
High Stood
Loop Line
Bridge under Garesfield Lane
Top of incline
Bankhead
Garesfield
To Winlaton
Double track
High Thornley
Track and a half (3 rails)
Cattle creep
To Winlaton
Bridge under Thornley Lane
Low Thornley
From Shotley Bridge
Thornley Wood
River Derwent.
Double track
Bridge over main road
From Winlaton
Winlaton Mill
Bridge over road. Bottom of incline
Winlaton Mill Sidings
Hag Hall
Park Gate
Bleach Green
To Blaydon
AXWELL PARK
Home Farm
The Hall
Axwell Villa
Blaydon Secondary School
Bates Houses
High Forge
To Gateshead
L.&N.E.R. CONSETT BRANCH
Loop line
Bridge under road Swalwell Bridge
Bridge under L.&N.E.R
Swalwell Allotment Crossing
Derwenthaugh Sidings
Staithes approach on trestles
Bridge over L.&N.E.R.
Derwenthaugh Staithes
From Blaydon
L.&N.E.R. REDHEUGH BRANCH
Scotswood Bridge
RIVER TYNE
Junction with Public Railway
Derwenthaugh.
River Derwent
OP
A
L
M
P
RP

ARCHITECT'S DEPARTMENT.
GENERAL OFFICES.
CONSETT. Co DURHAM
13TH FEBRUARY. 1934.

to notice that the application now is under a statute different from the statute which was before the court before. As I mentioned, the former application was under the Mining Industry Act, 1926, s. 13, and it was on the construction of sect. 13 (2) that the Court of Appeal held that this court had no jurisdiction, in the circumstances of the case. The matter which now arises is entirely different, and the present application is made under the Mines (Working Facilities and Support) Act, 1923, s. 3, which provides:

> (1) Where any facility, right, or privilege is required in order that minerals may be properly and conveniently worked by the person entitled to work the same, and the proper and efficient working of the minerals is unduly hampered by the inability or failure of that person to obtain such right, facility, or privilege (hereinafter referred to as an ancillary right), such ancillary right may be conferred in the manner and subject to the provisions hereinafter appearing on the person having the right to work the minerals who is working or desirous of working them either by himself or through his lessees.

Then it is necessary to look at sect. 4, which provides:

> (1) Neither the right to work minerals nor an ancillary right shall be granted under this Act unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons: (*a*) That the persons with power to grant the right are numerous or have conflicting interests; (*b*) that the persons with power to grant the right, or any of them, cannot be ascertained or cannot be found; (*c*) that the persons from whom the right must be obtained, or any of them, have not the necessary powers of disposition, whether by reason of defect in title, legal disability or otherwise; (*d*) that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable.

Sect. 5 provides for the application being made to the Board of Trade, who may and do refer it to this court. Sect. 6, which is of importance, provides:

> (1) Where a matter is so referred to the commission, the commission, if satisfied that the requirements of this part of this Act are complied with in the case of the applicant, and that it is expedient in the national interest that the right applied for should be granted to him, may, by order, grant the right on such terms and subject to such conditions, and for such period, as the commission may think fit, and upon such an order being made, the right specified in the order shall, subject to the provisions hereinafter contained, vest in the applicant.

The important thing to notice there—and there was naturally a good deal of discussion about it before us—is as to the requirements of the national interest. It has to be shown that it is expedient in the national interest. The last section to which it is useful to refer is sect. 9, which provides:

> (1) Where a right to work minerals or an ancillary right is granted or any restriction on the working of minerals is imposed under this part of this Act, the commission may determine the amount and nature of compensation or consideration to be paid or given and the persons to whom it is to be paid or given, either at the time when they determine whether the right should be granted or the restrictions imposed or at any subsequent time. (2) The compensation or consideration in respect of any right, including a right to enforce restrictions, shall be assessed by the commission on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted.

That appears to be the position with regard to the statute. I have already indicated that the facts are to be got, and to be got completely, from the judgments delivered in the previous application. I do not propose to read the judgments which were then delivered. I shall read one important passage, but in substance I desire to say for myself that I adopt the view of the facts which there was taken by MacKinnon, J., and by the commissioners who are now sitting with me.

I am satisfied that there has been no material change in the facts since those judgments were delivered. The only fact which appears to have altered to any extent is this: At the time when the judgments were delivered, the period of depression had certainly not come to an end. Happily, since those judgments were delivered, there has been a marked improvement in the coal industry generally, and in the position of the Consett Iron Co., Ltd., with whom we have to deal, particularly. But I am satisfied that there is nothing in that fortunate circumstance which affects the validity of the findings which were arrived at. It is for me a fortunate circumstance that, though the application then before the court was an application under a different Act, MacKinnon, J., in the part of his judgment which came later, dealt with the main points then before the court; but he dealt with the matter first exactly on the basis that it was an application such as the application we have now before us. I propose to read, and to adopt as my own, various passages in his judgment. When they are read, it will be at once apparent how exactly they fit the present application.

What the judge there said was:

> I propose first to consider the questions in this case as they would arise supposing both these leases had come to an end yesterday and the applicants were applying for a right to a wayleave over the land of the two respondents tomorrow, but the question, of course, arises under the Act of 1923 and the Act of 1926, and by sect. 13 (6) of the Act of 1926 the two Acts are to be read together. The questions I think on the hypothesis I have just made that would arise are four. First, are the applicants unduly hampered within sect. 3 (1) of the Act of 1923—unduly hampered by inability or failure to get the facility or privilege, or whether, under sect. 13 (2) of the Act of 1926 their working of coal, or its working in the most efficient and economic manner, is impeded by the terms or conditions contained in the mining leases, or sought to be imposed on them? The second question would be whether the terms granting this right demanded by the respondents are unreasonable within the meaning of sect. 4 (1) (*d*) of the Act of 1923? The third question would be, or is, whether it is in the national interest under sect. 6 (1) of the Act of 1923, that we should accede to the application of the applicants? The fourth question would be, or is, what compensation should be fixed to the respondents for granting these rights under sect. 6 (2), sect. 9, of the Act of 1923?

These passages which I have just read show, as I think, that MacKinnon, J., was there applying himself precisely to the problem which here arises, and I therefore go on to read the manner in which he solved the problem, and to adopt for myself what he then said:

> I think the first and second of those questions can be conveniently considered together. On this railway line the respondents have supplied certain of these strips of land over which the line passes. Mr. Faraday, a witness for the applicants, who was not cross-examined as to the evidence he gave, said that the value of the adjoining land, the value of this land, apart from the railway, is for nearly all its length purely agricultural. Agricultural rents in this region he said were at the rate of between 25*s*. and 30*s*. an acre. At the northern end, especially near the staiths, the land now has a higher value than an agricultural value, but that increase is due entirely to the applicants' enterprise. The respondents have done nothing to

> contribute to it, or to create it. While the respondents for this line have provided nothing but the surface, 2,757 acres of agricultural land, the applicants have equipped the line, laid the rails, made the embankments and sidings, and they have also provided the trucks for the carriage of the coal, and on the part of the line where engine haulage is required, because there is a small portion of it where the trucks run down by gravity to the colliery incline—for the greater portion where haulage is required they provide the necessary locomotives. The offer of the grant for continuing the facilities on the part of the Clavering Trustees I read from their letter; that is to say, practically the rates at present payable under the existing lease.

Then the judge refers to the offer of the Towneley Trustees, with which we need not now deal because that matter has been settled, and he goes on to say:

> Now, on these facts, I come, without any hesitation or difficulty, to the conclusion that the facility of the applicants to carry away their coal is, or will be, unduly hampered, and their power of carrying away their coal in the most efficient and economic manner is impeded by the terms demanded by the respondents. And, further, I come to the conclusion that each of the respondents demands terms which, having regard to all the circumstances, are unreasonable.
>
> The third question is: Is it in the national interest that the applicants should be granted a right of working on less onerous terms? The phrase "national interest" occurs, I think, twice in the 1923 Act, in sect. 6 (1) and in sect. 8 (4). In the 1926 Act, I think it occurs five times: In sects. 7 (2) (*a*), 8 and 10, and twice in sect. 13—namely, in subsect. (1) and in subsect. (2). No definition is given in either of the phrase "national interest," and no guidance is given in either Act as to the meaning of that phrase, or the tests to be applied, or the circumstances to be considered. There is in sect. 8 of the 1926 Act a reference to our power of hearing evidence on the question of national interest. Power is specially given to this court, but it is significant that that provision is in regard to the desirability of schemes of amalgamation of collieries, and as to the result, or the desirability of schemes of that sort. Economic problems, perhaps abstruse and obscure, may very well arise. "National" *prima facie* means affecting or shared by the nation as a whole. "Interest," I suppose, means to their good, benefit, privilege, or advantage. The question whether a particular coal mine, or the proprietor of a particular coal mine should have an ancillary right to a wayleave or tram track for a short distance can hardly be a matter of national interest in the sense of affecting the well-being or greater prosperity of the nations, or His Majesty's subjects. I think, having regard to the context, and the subject-matter, "national interest" must be a phrase used by contrast with the personal interest of individuals. Perhaps one might use the phrase, once popular with utilitarians: "The greatest good to the greatest number." Mr. Wrottesley, I think not without pertinence, reminded us that the preamble of a private Bill before the Committee of Parliament begins with the words, "Whereas it is expedient," and it is the task of the promoter, first of all, in opening the proceedings to satisfy the Committee that in the public interest it is true that it is expedient, and he suggests that the task delegated to us is very similar to that which is discharged by the Committee considering the expediency of allowing a motion to come up for private legislation. Now, in the sense in which I have suggested, we should consider this, is it in the national interest that a company employing thousands of men, in happier times, at any rate, an addition to the national wealth, should have its overhead charges reduced, or is it in the national interest that those overhead charges should be increased, and continue at this high rate by paying the arbitrary price that the landowner can exact for ungotten minerals for the sole benefit of that landowner?

The judge then refers to the argument of Mr. Wilfrid Greene which was then submitted to this court, and he finds, and finds quite definitely, that the condition as to national interest is made out. He then goes on to deal with the fourth question, which is: What compensation ought to be fixed? His conclusion as to that is that the view which was presented by the witness for the applicants was right, and that the proper compensation for the grant of the wayleaves was the agricultural or building value of the land plus compensation for severance or loss of amenity, or anything of that kind, and he says that on that basis it was admitted that the values given by Mr. Faraday were correct. Then he sums up the whole matter by saying:

> The result of all this is that my conclusion is that on the assumption on which I started, namely, that these two leases being determined yesterday, this application ought to be acceded to and we ought to grant the wayleaves as from tomorrow A
> for the use of these pieces of the respondents' land upon the terms offered by the applicants in their application.

I have also, of course, considered, and considered with care, the judgments which were delivered by my brother commissioners on that occasion. It is not necessary that I shall read them, for they are here to-day to speak for themselves. But, if the judgment of Sir Francis B
Taylor and the judgment of Sir Francis Dunnell are looked at, it will be made apparent that the commissioners were completely in accord with the judgment of MacKinnon, J., large extracts from which I have read.

I have not failed to consider, and to consider with the respect with C
which everything that falls from Roche, L.J., must be considered, the judgment which Roche, L.J., delivered in the Court of Appeal, a judgment which I think does indicate that on some points he was not disposed to agree with the findings of fact of these commissioners. I have not regarded that judgment as being, and it clearly is not, the decision of the D
Court of Appeal. Greer, L.J., expressed an entirely different opinion, and Slesser, L.J., conceded that the case could be decided upon another ground, and upon a ground upon which Roche, L.J., agreed with him, and expressly refrained from making any decision with reference to this matter. In these circumstances, the judgment of the Court of Appeal E
clearly went on the other point, and, while I have considered with care the judgment of Roche, L.J., and also, on this point, the judgment of Greer, L.J., I see nothing which should induce me to modify the view I have formed, that, upon the evidence which was before us, there is nothing which ought to make this court depart from the view at which it F
formerly arrived.

Out of respect for the argument of Sir Walter Monckton, I refer, though quite briefly, to two or three points with which he dealt. It seems to me to be clear that it is wrong to say that the applicants, as Sir Walter Monckton put it, have the right. They have not. They had the right, G
but on terms which we hold to be unreasonable. They determined it, because they regarded the terms as unreasonable, and they are now entitled to come to this court. Then Sir Walter argued that there was no evidence that the applicants were unduly hampered. This point was completely covered by the former decision in this court, but it H
is the only point in the case which has given me any difficulty, and I desire to say just a word about it. The argument was that there was no evidence at all that the applicants were not carrying on in the ordinary way, and were not obtaining contracts, and that they had obtained contracts. What was said in substance was that it was simply a

question of finance as between the one and the other, and it was assumed that a large, or unduly large, sum was paid. None the less there was no evidence that the applicants were hampered by that. I think the answer is that it must be hampering to any business of this sort to have no security of tenure. It seems to me to be obvious that the applicants carrying on this business of getting coal must be in a position, not merely to take their coal away to-day, but also to know that they will be able to take it away tomorrow. I think that it must be hampering to them if they are in such a position that they cannot, except on unreasonable terms, obtain that security of tenure which is essential. That is the conclusion which I should have arrived at. There is, I think, direct evidence to support that in the evidence of Mr. George. That certainly is quite specific evidence, which, as I think, justifies the conclusion that—as I have already indicated, it is the only point which has given me the slightest trouble—there is ample material to justify us in holding that the applicants are unduly hampered.

As to national interest, somewhat similar considerations apply, but I think that in regard to national interest one may look at it from more than one point of view. One point of view is that it is important in the national interest that a number of people should get employment at proper wages, and I think that therefore it must be considered in the national interest—not only in the interests of individuals, but also in the general interest—that reasonable facilities for sending away the coal should exist.

Then there was some discussion with regard to the Lands Clauses Acts, and our attention was called to one or two cases under those Acts. I have already indicated that I think that the problem we have to deal with is a problem arising under this very Act, and sect. 9 (2) deals with it. Indeed, I doubt whether any real analogy at all is to be drawn between the sum to be paid by way of compensation for a mineral wayleave and the sum to be paid on the compulsory purchase of land under the Lands Clauses Acts. It is perhaps worth noting, however, as our attention was called to these cases, that, if the passages now usually referred to in the judgment of FLETCHER-MOULTON, L.J., in *Re Lucas & Chesterfield Gas & Water Board* (1), at pp. 30, 31, are looked at, FLETCHER-MOULTON, L.J., there makes it quite clear that under the Lands Clauses Acts the need of the particular person acquiring the land must not be regarded. Here, if we are going to apply that analogy, it would seem to be clear that one person, and one person only, would need this wayleave—that is, the person acquiring it, the colliery company. Nor do I think for myself that any help is to be got from the decision in *Inland Revenue Comrs.* v. *Clay* (2). That was a case under a very well-known section of the Finance Act, 1910. It related to the sum to be paid in respect of the acquiring of a nursing-home at Plymouth. For myself, I do not think that in that, any more than in the decision under the Lands Clauses Act, is any direct guidance to be obtained as to the problem we have to solve. That problem, I repeat, is solved, as I think, by looking at the actual section under which we are proceeding, and by applying it.

The conclusion at which Sir Walter, as a result of his very able argument, asked us to arrive, cannot, as I think, be right. Put shortly, that conclusion was that, in arriving at value, the basis of calculation must be the rent or annual payments which have been paid. Those are the very things which have been held to be wrong and unreasonable. It seems to me at once apparent that that conclusion cannot possibly be right. If applied to its full extent, it would really involve this, that one was to stereotype and fix for ever the basis as a basis that we have held to be wrong and unreasonable. I think that that requires no more than to be stated to make it clear that the argument so ably urged is one that cannot possibly be correct. My conclusion, therefore, is that this application succeeds, and that the applicants are entitled to the order for which they ask. Regarding it purely as a matter of valuation, that really was the only valuation which was before us.

I will add only this. There was some discussion in the course of the case as to the date from which the order should date. It was ultimately agreed, and it is proper that I should mention it, that the order should date from to-day.

For these reasons, I am of opinion that the applicants here are entitled to succeed, and to have the order for which they ask.

Sir Francis Taylor, K.C.: I agree with what Finlay, J., has said in the order that he thinks is right. This application under the Mines (Working Facilities and Support) Act, 1923, is for the grant of a right of way over certain strips of land, coloured green on Plan No. 3, belonging to the Clavering respondents forming part of a waggonway from the applicants' collieries on the River Tyne. The respondents are willing to grant this right, but only on the terms of the former lease (with an immaterial exception), which was determined by the applicants by notice expiring on Dec. 31, 1936. In the previous application, MacKinnon, J., held those terms to be unreasonable, and he described them as "the price of the grantors' willingness," as did both the commissioners, Greer, L.J., and now Finlay, J., to-day, a view which was not dissented from by Slesser, L.J., nor, I think, by Roche, L.J. (now Lord Roche), although he was of opinion that the working of the coal was not proved to have been in fact impeded by them. I adhere to this view on the evidence in this application, and, if the view is right, the respondents have demanded, and now demand, unreasonable terms for the grant of the right.

Sir Walter Monckton submitted that, inasmuch as the applicants by their own act put an end to the existing rights, any failure or inability to obtain it was self-induced, and therefore not within the provisions of sect. 3 of the Act of 1923.

The applicants had originally to submit to these terms, and were compelled to be satisfied with them, as terms upon which alone they could

obtain the right. This situation endured until 1923. After that date, in 1927, the applicants were prepared to pay, and offered, a large sum of money in order to be rid of the financial burden. That offer was not accepted. The former application to modify the terms of the contract was made, but the Court of Appeal decided that there was no jurisdiction
A to accede to it. The applicants had then either to submit or to put an end to the lease and try the effect of this application. They were entitled in law to determine it, and justified, in my view, in so doing in order to free themselves from unreasonable exaction. I am unable to accede to the view that they have disentitled themselves from proceeding under
B the Act of 1923.

Sir Walter also contended that the applicants have now a right of way, and that on that ground they are not within the provisions of sect. 3. The precarious user which they now have is not, in my view, a right within the meaning of sect. 3.

C As they have not the right to pass over the respondents' land to carry away the output of their collieries, I think that they require such a right for that purpose and for the proper and convenient working of the minerals. Also, in my opinion, the proper and efficient working of the minerals is unduly hampered by their failure to obtain the right. It does
D not appear to be a sufficient answer to this application that the applicants can obtain the right by complying with the terms demanded; nor is it a sufficient answer that they are at present passing over these lands and carrying away their output at will or on sufferance under the terms of the arrangement to be inferred from the letters of Jan. 1 and Jan. 9, 1937.

E The evidence of Mr. George, which has been referred to by Finlay, J., satisfies me that, without the right, the position of the applicants is uncertain and insecure. The business of these collieries cannot be conducted on such a basis. Colliery owners must have certainty that they can execute contracts, that they can carry away the coal, continu-
F ously, and on reasonable terms, over a period of years. It is in the power of the respondents to stop the transit at any moment. Such a proceeding may be improbable. These lands or strips of land, however, might be sold to purchasers with different views.

If, on the facts of this case, the conclusion that a proper and efficient
G working of the minerals is unduly hampered by failure or inability to obtain the right is erroneous, it would seem that, on the one hand, the grantee of a wayleave cannot be relieved from oppressive terms, and, on the other, that a user on sufferance must submit to exaction if he desires to obtain a right, unless and until the exaction becomes so onerous that
H working at a profit becomes impossible. For reasons already stated—stated by Finlay, J., and stated by me—the provisions of sect. 4 (1) (*d*) have been complied with by the applicants. They have, in my opinion, made an unreasonable demand.

Under the provisions of sect. 9, it has to be shown to be expedient in the national interest that the mineral resources of the country should

be utilised. They cannot be utilised unless they can be properly and
conveniently worked, which includes carrying them away, not on
sufferance, but by right. National interest must, in this case, by the
provisions of sect. 6, be considered in relation to the right required.
Any opinion of Roche, L.J., must command respect and deference.
His observations on the question of national interest on the hearing of A
the appeal in the first application were directed to the consideration
of national interest in relation to the modification of financial terms of
an existing lease. I do not think that they implicitly conflict with the
view that the right required is expedient in the national interest.
National interest is also properly to be regarded in relation to the employ- B
ment of large numbers of workers.

It was said by Sir Walter Monckton that this application is in substance
nothing but a contest for individual pecuniary interests ; it was a question
of £2,500 per annum or £150 per annum. It concerns the applicants
and respondents, and no one else. The answer made, in my opinion, is C
correct, in that it is not expedient in the national interest that the
working of coal should be burdened by any oppressive exactions. Such
exactions fall on individuals, but they concern the nation, and are not
expedient in the working of the national coal resources. Sir Walter
does not, I think, dispute that these considerations are relevant to the D
sphere of national interest, but he contends that, as there is no existing
peril of the loss of user, they do not arise, and in that way the question
of " unduly hampered " is reintroduced, and that subject has already been
discussed.

Sect. 9 requires us to assess compensation for the statutory grant on E
the basis therein expressed—namely, what is fair and reasonable between
a willing grantor and a willing grantee.

The only evidence we have had about value, and what is fair and
reasonable, in my opinion, is Mr. Faraday's—namely, the agricultural
value. It is said that we should have regard to the rent paid in past F
years. It would seem illogical to have regard to that which we have
decided to be unreasonable as an element or basis in arriving at what is
fair and reasonable. We have no evidence of conditions or terms of
mining leases in the district. There is Mr. Barrett's opinion, and I
prefer Mr. Faraday's. G

The case of *Inland Revenue Comrs.* v. *Clay* (2) was referred to as sup-
porting the proposition that that which constitutes value to a willing
seller should be taken into account, and that therefore we should have
regard to the physical situation of these strips of land between the
colliery and the Tyne. This consideration, in my opinion, has been H
regarded. The question in that case arose under the Finance Act, 1910,
s. 25. Neither the Finance Act nor the Lands Clauses Acts for compulsory
purchase assist the construction of the compensation clause of the Act
of 1923, which has to be dealt with in this application. We are not
assessing the value of land which is rent-producing, but the fair and

reasonable compensation for a right of way over agricultural land which is unlet. I agree with the order proposed by FINLAY, J.

SIR FRANCIS DUNNELL: I am entirely in agreement with the judgments which have been delivered by SWIFT, J., and by SIR FRANCIS A TAYLOR. The only observation I wish to make is that I am satisfied that the requirements of Part I of the Mines (Working Facilities and Support) Act, 1923, are complied with in the case of the applicants, and that it is expedient in the national interest that the right applied for should be granted to them on the terms which the applicants offered B to the respondents—namely, the payment of £10 per acre in respect of the area of land belonging to the respondents, over which land the applicants desire to pass. In my opinion, those terms are fair and reasonable.

I expressed my views fully in the judgment which I delivered on the C previous application, and, so far as those views are applicable to the circumstances of the present application, I see no reason to modify them.

Order applied for granted.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the applicants); *King, Wigg & Brightman*, D agents for *Clayton & Gibson*, Newcastle-upon-Tyne (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

WELCH *v.* ROYAL EXCHANGE ASSURANCE.

E [KING'S BENCH DIVISION (Branson, J.), **January 28, 1938.**]

Insurance—Fire insurance—Claim—Proof and particulars—Conditions precedent—Compliance within a reasonable time—Banking accounts only disclosed on cross-examination.

The claimant was insured with the defendants against fire, and the F policy contained a condition which, so far as its nature permitted, was deemed to be a condition precedent to the right of the insured to recover thereunder. By that condition the insured was to give to the insurers all such proofs and information with respect to any claim as might reasonably be required. The insured in fact operated and controlled banking accounts in the name of his mother, and, despite repeated requests for information as to his banking accounts both before and in G the course of arbitration proceedings, did not disclose these accounts until he was cross-examined in the arbitration. It was contended that the withholding of this disclosure until so late a period in the proceedings was a breach of the above condition:—

HELD: upon the proper construction of the condition, the insured was bound to give the required particulars within a reasonable time of H being asked to do so. If he did not do so, and, in the above circumstances he had not done so, he was barred from recovering under the policy.

[EDITORIAL NOTE. The question here is whether the insured must give the required information within a reasonable time of the requiring of it, or whether it is sufficient compliance with the condition that the information is ultimately given. It will be noted that, according to the terms of the condition, the result of non-compliance with it is to bar completely any recovery under the policy, but despite this it is held that the required particulars must be given within a reasonable time. The condition is distinguished from less severe ones by the omission of such words as "unless and until the terms of this condition have been complied with," which allow the condition to be complied with at any time.

As to Proof of Claim, see HALSBURY, Hailsham Edn., Vol. 18, p. 462, para. 683; and for Cases, see DIGEST, Vol. 29, pp. 332-335, Nos. 2696-2715.] A

Cases referred to:

(1) *Re Bradley & Essex & Suffolk Accident Indemnity Society*, [1912] 1 K.B. 415; 29 Digest 404, *3197*; 81 L.J.K.B. 523; 105 L.T. 919.

(2) *Stoneham* v. *Ocean Ry. & General Accident Insurance Co.* (1887), 19 Q.B.D. 237; 29 Digest 402, *3183*; 57 L.T. 236.

(3) *Weir* v. *Northern Counties of England Insurance Co.* (1879), 4 L.R. Ir. 689; 29 Digest 332, case *2699 xi*. B

Appeal by way of special case from the award of an arbitrator made in respect of a claim under a fire policy issued by the Royal Exchange Assurance. The facts as stated in the case are set out in the judgment. C

Norman Birkett, K.C., and *R. E. Borneman* for the appellant.

Roland Oliver, K.C., and *Philip Vos, K.C.*, for the respondents.

Branson, J.: This is an appeal by way of a special case from the award of an arbitrator, Sir Walter Monckton, made in respect of a claim by the claimant against the Royal Exchange Assurance. The claim D arises out of a fire which took place upon the insured's premises on Nov. 26, 1934. He claimed against the respondents on a policy which he had with them dated June 19, 1929. These questions arise: (i) whether certain conditions in that policy were conditions precedent to the right of the plaintiff to make a claim, in the sense that non-fulfil- E ment of those conditions put an end once and for all to any right in him to claim under the policy in respect of the fire which took place on Nov. 26, 1934, (ii) or whether, in the events which have happened, though, at the moment when the arbitration which took place between the parties commenced, he had not fulfilled the condition in question, what took F place at the arbitration amounted to a fulfilment of it, and consequently removed the bar which, when the arbitration commenced, would, on that construction of the policy, have prevented him from recovering. The arbitrator in his case found the following facts, which are material to the point which has arisen before me. The policy contained a number G of conditions, and with regard to those conditions the policy used the following language:

> The corporation agrees (subject to the conditions contained herein or indorsed hereon, or otherwise expressed hereon which conditions shall, so far as the nature of them respectively will permit be deemed to be conditions precedent to the right H of the insured to recover hereunder) that if after payment of the premium the property insured [is damaged, certain results shall follow].

As I have said, there was a fire at the claimant's premises, and the arbitrator, after setting out the material conditions of the policy, to which I shall refer later, found the following facts:

(*a*) Information about all bank accounts used or controlled by the claimant

> for the purposes of his business was required by the respondents on several occasions, both before the arbitration proceedings began and before delivery of the unamended points of defence. (*b*) One Mrs. Welch, the mother of the claimant, had two bank accounts, namely, a loan account and a current account. Both those accounts were used and controlled by the claimant for the purposes of his business. Large sums of money accruing to the claimant in his business were paid to him into the said accounts [it must be "by him"] and large sums were drawn out of the said accounts by him for the purpose of his business. (*c*) On being required by the respondents to give information concerning the bank accounts used or controlled by him as aforesaid, the claimant failed to give the respondents any information in respect of the two bank accounts of the said Mrs. Welch.

Then para. 5 is:

> During the hearing before me and in the course of the cross-examination of the claimant, the claimant for the first time offered to give and did give full information as to the two banking accounts of the said Mrs. Welch. Until the said accounts were produced as aforesaid, the respondents were not in possession of sufficient information to enable them to allege the claimant's failure to give information in respect of the said accounts as a breach of Condition IV of the said policy. In the course of the hearing and after the production of the said accounts, the respondents applied for leave to amend their points of defence, and I allowed the amendment.

Then the arbitrator goes on, in para. 6:

> By their amended points of defence the respondents contended that the claimant's failure to give the information about the said accounts when required to do so constituted a breach of Condition IV of the said policy, and that the said breach ought to preclude the claimant from recovering any sum in respect of his claim under the said policy. The respondents further contended that the claimant fraudulently concealed the said accounts from the respondents, and that by reason thereof he ought to be precluded from recovering any sum in respect of his claim under the said policy.

Then, after setting out the contentions of the claimant, which I need not read at the moment, he finds as a fact:

> That the said information as to the said accounts was reasonably required by the respondents; (*b*) that the claimant failed to give the respondents information as to the said accounts when the said information was required by the respondents; (*c*) that the claimant did not fraudulently conceal the said information from the respondents; (*d*) that the said accounts when disclosed did not contain any material which justified or tended to justify the respondents in repudiating the claim under the said policy.

Upon those facts, the arbitrator proceeded to hold:

> that the claimant's failure to give information as to the said accounts when required to do so constituted a breach of Condition IV of the said policy, even though the said accounts when disclosed did not contain any material which justified or tended to justify the repudiation of the claim under the said policy.

He then proceeded to hold:

> that there had been a breach of Condition IV of the said policy at the time when the arbitration proceedings began, that the said breach constituted a bar to the claimant's right to recover in respect of his claim, and that the said breach could be relied upon by the respondents so soon as they were permitted to raise the point by amendment of their points of defence.

He then held:

> that Condition IV is a condition precedent to the respondents' liability in respect of a claim under the said policy [and] that a breach of the said condition disentitles the claimant to recover any sum in respect of his claim under the said policy, and that the fact that the respondents were in possession of the required information at the time when they amended their points of defence did not preclude them from relying upon the claimant's failure to supply the said information at any earlier date as a bar to his right to recover any sum in respect of his said claim.

Having come to that conclusion, the arbitrator proceeded to give certain directions as to what was to follow in consequence, the main one being that, though he found that, apart from this point, the claimant could recover a large sum of money, in view of this point, he was not entitled to recover anything at all. So, from the claimant's point of view, this question raised before me is one of very great importance. A

The first matter for consideration is whether, upon the true construction of this policy, the passage in cl. 4 upon which the respondents rely constitutes a condition precedent to the right of the claimant to recover anything at all in respect of the present claim under the policy. It is not contended that the breach of Condition IV has destroyed the policy. B In other words, it is not contended that this condition was a condition precedent to the validity of the policy. What is contended is that it is a condition precedent to the liability of the insurers, and that, therefore, the condition not having been fulfilled at any time, this claim cannot succeed, and that the arbitrator was right in coming to the conclusion C that the claimant's claim failed.

What is said on behalf of the claimant is, first of all, that, upon the true construction of this policy, there is no condition precedent at all. In support of that contention, reliance is placed upon the decision of the Court of Appeal in *Re Bradley & Essex & Suffolk Accident Indemnity* D *Society* (1). It is said that, upon the authority of that case, I could altogether ignore such expressions in this policy as seem to say that the condition in question is a condition precedent, and that I could, as a matter of construction, hold that it was not anything of the kind. I do not know whether I am overstating Mr. Norman Birkett's powerful E argument, but I think that that is a fair representation of it upon this point. I do not think that that case goes anything like far enough to support that proposition. When one comes to look at it, it appears to me that what it actually decides is that, if, upon a close consideration of the conditions of the policy, it appears that, though there are general F words showing that the conditions are to be conditions precedent to any liability of the society under the policy, one will find over and over again that they cannot be; and, therefore, it is not enough to say: "Here are a lot of conditions covered by that general provision, and you must construe them all as conditions precedent." For example, when G Cozens-Hardy, M.R., was dealing with the matter, he used this language, at p. 421:

> Now it is perfectly clear that some of these so-called conditions are not and cannot be conditions precedent, although some of them may be and are conditions precedent.

H

Then he says that Nos. 1 and 2 in the notice may be conditions precedent, but that:

> No. 3, so far as any meaning can be attributed to it, seems to me not to be a condition precedent.

The condition with which they were really dealing was No. 5, and

COZENS-HARDY, M.R., in reading the first sentence and the third sentence, said that they could not possibly be conditions precedent, and that, that being so, he was not going to hold that the general words converted the middle sentence there into a condition precedent. FLETCHER MOULTON, L.J., energetically dissented from the view expressed by the A other two members of the court. The third member of the court, FARWELL, L.J., devoted most of his judgment to a statement—no doubt entitled to the utmost respect—that in his view clauses of this sort in a policy ought to be most carefully watched, and ought not to be given effect to unless they were contained in the proposal form also. B No such point as that is raised before me now. The result is that I find it difficult to draw any help from that case, particularly in view of the fact that it appears to me that the covering clause, if I may so term the clause at the beginning of the policy which says that the conditions are to be deemed conditions precedent, appears to avoid the difficulty C raised on the language of the policy in *Bradley's* case (1) by using the words "so far as the nature of them respectively will permit," thus taking away the possibility from anybody who was trying to say that the general clauses could not be construed to turn the conditions into conditions precedent, because some of them were not capable of that D transmogrification.

The case of *Stoneham* v. *Ocean Ry. & General Accident Insurance Co.* (2) appears to me to be an authority stating in quite plain terms that, where one has language expressing the intention of the parties that the conditions should be conditions precedent, the court will so construe it. E It is most clearly stated by CAVE, J., at p. 241:

> It seems to me that the rational conclusion is that all these conditions mean what they say, and that where there is a provision that the condition shall be a condition precedent it is so, but where there is no such provision it is not.

I think that it is my duty to look at the language used by the parties F to this contract (bearing in mind the point that Mr. Norman Birkett takes, that it is the language of the insurance company and not the language of the assured, and, therefore, that, if there is any real doubt in the matter, that doubt should be resolved *contra proferentem*), and see what it really does mean. I think that one has to read Condition IV G in the light of the fact that it occurs on the back of the contract on the face of which there is the clause which I have already read, that the conditions shall be deemed conditions precedent to the right of the insured to recover thereunder, also bearing in mind that that is to be the case so far as the nature of these conditions respectively will permit. H I turn then to Condition IV. I do not think that it is necessary to read the beginning part, except to point out that it begins with the words:

> On the happening of any destruction or damage, the insured shall forthwith give notice . . .

The material words are:

> The insured shall also give to the corporation all such proofs and information

with respect to the claim as may reasonably be required, together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this policy shall be payable unless the terms of this condition have been complied with.

It seems to me, reading that, bearing in mind the fact that it is a condition in a policy wherein the insurers are seeking for information to enable them to check the claim which is being put forward by the insured, that the A
first question that arises upon it is whether there is any obligation to give that information, and at any particular time. It is contended by Mr. Norman Birkett, on behalf of the claimant in this case, that there is no time limit, and that the real meaning and intention of that clause are that the insurers are saying: "Mark you, until you give me the B
information which I shall reasonably require, you may proceed to get an award, you may proceed to get anything you like, but I will not pay you and I shall not come under any liability to hand over to you any money unless these conditions have been complied with." The result would be, as it seems to me, that, if that is a correct interpretation, an C
insured might decline to give information which was reasonably asked, and might proceed to arbitration claiming money in spite of not having given that information, and, when defeated at that arbitration by reason of this clause, he has only to give the information, and then start proceedings all over again. I cannot believe that either party to this D
contract can have thought that that was to be the way in which it could work out. It seems to me, there being no time mentioned, that the ordinary rule would apply, and that the contract means that the proof and information which may reasonably be required have to be given within a reasonable time. If any question arises as to whether the E
reasonable time had been exceeded, that would be a matter for a judge of fact, to wit, an arbitrator under the agreement. If that be the proper construction—and I see no reason why the ordinary implication of a reasonable time should not have effect with regard to this clause in the contract—what had to be done was that the claimant should give the F
information which was demanded of him within a reasonable time. What was to be the result if that condition were not fulfilled? The policy says the result will be "that no claim under this policy shall be payable," not "unless and until," but "unless the terms of this condition have been complied with." That means this, as it seems to me. If the G
condition has not been complied with, no claim under the policy shall be paid. If that is the true construction, the result is that this claimant, having failed within a reasonable time—for it must be a failure not to have done it before the arbitration commenced—to comply with the condition, has lost his right to make his claim under this policy. H

Mr. Norman Birkett has argued strenuously that there must be some difference between the meaning of the words "no claim shall be payable" and the right to recover. With all his acumen, he has failed to indicate to me that there is any real difference between the two things. I cannot see any difference between saying "no claim shall be payable" and saying "nothing shall be recoverable." They seem to me to imply exactly the same thing, and that is that the claimant shall not be allowed to succeed in enforcing his claim unless he shall have fulfilled the condition. It is, as I construe it, a condition to give this information within a reasonable time. That has not been fulfilled, and the claim, therefore, A cannot be enforced.

One other case I should refer to is *Weir* v. *Northern Counties of England Insurance Co.* (3), a case decided by the Common Pleas Division in Ireland in 1879. I need not deal with it in detail, because I think that the difference between it and the case before me can be stated quite B shortly. In that case, there was a provision that notice should be given within fifteen days, and accounts, vouchers, and so forth, such as might reasonably be required, should be given. Then the clause goes on:

> And in default thereof no claim in respect to such loss or damage shall be payable until such notice, account, proof and explanations respectively are given and C produced.

As the court points out there, if the clause had stopped after the word "payable" and before the word "until," it would have construed the provisions as conditions precedent, and a man who had not delivered his account within fifteen days would have been held to be barred by D that condition from recovering. But the court points out that it does not stop there, but goes on with the words "until such notice, account, and so forth shall be delivered," showing clearly that there was an extension of time contemplated within which the claimant might deliver his notice, and might repair his fault and place himself in the E position of being able to recover. This clause here does not, as I read it, mean anything of the kind. It does not say: "No claim shall be payable until such proof shall be given." It says: "No claim shall be payable unless the terms of the condition have been complied with." As I read it, it simply means exactly the same as if it had said: "No F claim shall be payable if the terms have not been complied with, or if default has been made in complying with the terms."

The result of it is that, in my view, the arbitrator was correct in refusing to give effect to the contentions of the claimant, and correct in holding, as he did, in paras. 11, 12, 13, that failure to deliver the G information required within a reasonable time of the requiring of it constituted a fatal bar to the claimant's right to recover in respect of this loss. What is to follow from that is decided by the arbitrator in para. 15 of his award. This means a dismissal of the appeal with costs.

Appeal dismissed with costs.

H Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *William Charles Crocker* (for the respondents).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

THE STRANNA.

[Court of Appeal (Greer, Slesser, and Scott, L.JJ.), **December 15, 16, 17, 1937, January 31, 1938.]**

Shipping—Bill of lading—Perils of the sea—Unexplained heeling of ship and loss of cargo when loading. A

The Stranna was loading from boats a deck cargo of timber to be carried "at charterers' risk" and "perils of the sea excepted even when occasioned by negligence." During the process of loading, the Stranna heeled suddenly, and part of the cargo was shot overboard, drifted away in the fog, and was never recovered. The cause of the sudden heeling was not satisfactorily explained. It was contended by the appellants that this was not a loss due to any peril of the sea, B and that there had been a breach of the warranty of seaworthiness:—

Held: (i) the ship was seaworthy when loading started, and the temporary instability while loading was not a breach of the warranty of seaworthiness.

(ii) the loss was due to a peril of the sea, from which the defendants were excused by the terms of the bill of lading. C

Decision of Langton, J. ([1937] 2 All E.R. 383) *affirmed.*

[EDITORIAL NOTE. In this case the definition of the words "peril of the sea" has had to be fully considered. It is pointed out that what happened to the ship in the case was something which could not have happened on land, and was at the same time characteristic of the sea and of the behaviour of ships. It was held to be, therefore, one of the sea risks to which maritime commerce is exposed. D

As to Perils of the Sea, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 110, 111, para. 190; and for Cases, see DIGEST, Vol. 41, pp. 414-417, Nos. 2573-2606.]

Cases referred to:

(1) *Steel* v. *State Line S.S. Co.* (1877), 3 App. Cas. 72; 41 Digest 428, *2693*; E 37 L.T. 333.

(2) *Grant, Smith & Co. & McDonnell, Ltd.* v. *Seattle Construction & Dry Dock Co.*, [1920] A.C. 162; 29 Digest 199, *1585*; 89 L.J.P.C. 17; 122 L.T. 203.

(3) *Stott (Baltic) Steamers, Ltd.* v. *Marten*, [1916] 1 A.C. 304; 29 Digest 225, *1828*; 85 L.J.K.B. 97; 114 L.T. 91.

(4) *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser, & Co.* (1887), F 12 App. Cas. 484; 29 Digest 197, *1575*; 56 L.J.Q.B. 626; 57 L.T. 695; *revsg.* S.C. (1886), 17 Q.B.D. 195.

(5) *Cullen* v. *Butler* (1816), 5 M. & S. 461; 29 Digest 224, *1815*; *previous proceedings* (1815), 4 Camp. 289.

(6) *Sassoon (E. D.) & Co.* v. *Western Assurance Co.*, [1912] A.C. 561; 29 Digest 199, *1584*; 81 L.J.P.C. 231; 106 L.T. 929. G

(7) *Samuel (P.) & Co.* v. *Dumas*, [1924] A.C. 431; 29 Digest 112, *666*; 93 L.J.K.B. 415; 130 L.T. 771; *affg.*, [1923] 1 K.B. 592.

(8) *Mountain* v. *Whittle*, [1921] 1 A.C. 615; 29 Digest 127, *799*; 90 L.J.K.B. 699; 125 L.T. 193; *affg.* S.C., [1920] 1 K.B. 447.

(9) *Merchants Trading Co.* v. *Universal Marine Co.* (1870), *cited in* L.R. 9 Q.B. at p. 596; 29 Digest 197, *1572*. H

(10) *The Christel Vinnen*, [1924] P. 208; 41 Digest 423, *2654*; 93 L.J.P. 138; 132 L.T. 337.

(11) *Blackburn* v. *Liverpool, Brazil & River Plate Steam Navigation Co.*, [1902] 1 K.B. 290; 41 Digest 431, *2707*; 71 L.J.K.B. 177; 85 L.T. 783.

(12) *Davidson* v. *Burnand* (1868), L.R. 4 C.P. 117; 29 Digest 194, *1538*; 38 L.J.C.P. 73; 19 L.T. 782.

(13) *Wilson, Sons & Co.* v. *Xantho* (*Cargo Owners*) (1887), 12 App. Cas. 503; 29 Digest 197, *1567*; 56 L.J.P. 116; 57 L.T. 701.

(14) *Laurie* v. *Douglas* (1846), 15 M. & W. 746; 41 Digest 421, *2642*; 4 L.T. 588.

(15) *The Accomac* (1890), 15 P.D. 208; 41 Digest 430, *2700*; 59 L.J.P. 91; 63 L.T. 737.

(16) *Wade & Sons Co., Ltd.* v. *Cockerline & Co.* (1905), 53 W.R. 420; 41 Digest A 435, *2730*.

(17) *Svenssons* (*C. Wilh.*) *Travaruaktiebolag* v. *Cliffe S.S. Co.*, [1932] 1 K.B. 490; Digest Supp.; 101 L.J.K.B. 521; 147 L.T. 12.

(18) *Dudgeon* v. *Pembroke* (1874), L.R. 9 Q.B. 581; 29 Digest 157, *1131*; 43 L.J.Q.B. 220; 31 L.T. 31; *on appeal* (1875) 1 Q.B.D. 96; (1877), 2 App. Cas. 284.

B

APPEAL from a decision of LANGTON, J., dated Mar. 22, 1937, and reported in [1937] 2 All E.R. 383.

Sir Robert Aske, K.C., and *J. V. Naisby* for the appellants.

H. U. Willink, K.C., and *Cyril Miller* for the respondents.

C *Aske, K.C.:* There is no proof that this loss was caused by any peril of the sea. The onus of proof is on the ship, and the ship is not excused for any inexplicable or unexplained accident. That would be a very wide extension of anything hitherto held to be a peril of the sea. The nearest case to this is *Grant, Smith & Co. & McDonnell, Ltd.* v. *Seattle* D *Construction & Dry Dock Co.* (2). [Counsel referred to *Samuel* (*P.*) *& Co.* v. *Dumas* (7).] To constitute a peril of the sea, there must be some action of sea or wind, and something fortuitous. In this case, it was calm and still. When the ship listed, there must have been some unknown inherent instability. The term "perils of the sea" does not include E unexplained losses at sea: *Sassoon's* case (6), *Mountain* v. *Whittle* (8) and *Merchants Trading Co.* v. *Universal Marine Co.* (9). [Counsel also referred to *The Christel Vinnen* (10), *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (4), *Blackburn* v. *Liverpool, Brazil & River Plate Steam Navigation Co.* (11), *Davidson* v. *Burnand* (12), *Wilson, Sons* F *& Co.* v. *Xantho* (*Cargo Owners*) (13), *Laurie* v. *Douglas* (14) and *The Accomac* (15).]

The cases of *Wade & Sons Co., Ltd.* v. *Cockerline & Co.* (16) and *Svenssons* (*C. Wilh.*) *Travaruaktiebolag* v. *Cliffe S.S. Co.* (17), which were relied on by the judge below, were cases of accidents to a hull, and are G irrelevant. There is no case which establishes that, where a loss is due to the unfitness or instability of a ship, not contributed to by the condition of wind or waves, such loss is occasioned by a peril of the sea.

Willink, K.C.: Both *Sassoon* (*E. D.*) *& Co.* v. *Western Assurance Co.* (6) and *Grant, Smith & Co. & McDonnell, Ltd.* v. *Seattle Construction & Dry* H *Dock Co.* (2) were cases of marine insurance where the loss was due to inherent vice. It is necessary to distinguish them from cases of contracts to carry goods. The word "fortuitous" excludes a deliberate or purposeful act: *Samuel* (*P.*) *& Co.* v. *Dumas* (7). It is an accident if cargo falls into the water and is lost; that is indisputable. It is submitted that the words "of whatsoever nature and kind" qualify "dangers and accidents of the seas," and not "ports of loading." That is the true construction of the document. The whole purpose is to extend the meaning of "perils of the sea," though the words do not cover anything that is not a marine peril. [Counsel referred to *Dudgeon* v. *Pembroke* (18) and *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser, & Co.* (4).] [He was stopped by the court.]

Aske, K.C., in reply.

Greer, L.J.: The question involved in this appeal is whether the loss of certain wood cargo delivered on board the Stranna was within the exceptions contained in the bill of lading which was the binding contract between the receivers and the ship. The words of the exception in the bill of lading are as follow:

> . . . perils of the sea . . . and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . of whatever nature and kind soever . . . always mutually excepted, even when occasioned by negligence, default or error in judgment of the . . . master, mariners or other servants of the shipowners.

The facts of the case were not really in dispute. They are stated as follow by Langton, J., in his judgment, at p. 384:

> The uncontroverted facts are as follows. On July 23, 1935, the "Stranna" was lying in an open roadstead called Herring Cove, New Brunswick. She had been lying at anchor at this spot since July 12, taking on board a cargo of timber composed of 1,200 standards, or 48,130 pieces, of which 9,618 pieces were to be carried on deck. At about noon on July 23, about 12 standards remained to be loaded. The weather was a thick fog, there was no appreciable wind, and the water was calm. Herring Cove is situated just north of Matthews Head, in Chignecto Bay, off the coast of New Brunswick, and the cargo of the "Stranna" was being brought out to her in vessels known as motor-scows which came out of the river Alma into the Cove. In the early afternoon, the vessel, whilst still loading, listed to port, and carried away the wooden uprights or stanchions on the port side, thereby causing a considerable quantity of timber to be lost overboard. The vessel then rolled to starboard, and uprights on that side were likewise broken, causing or allowing more of the cargo to fall overboard. A flood tide was running at the time. The timber drifted away, and was soon lost sight of in the prevailing fog, and was not recovered. In all, the lost timber amounted to 4,843 pieces.

The defendant shipowners properly admitted that a *prima facie* case was made out against them by reason of their non-delivery of the cargo which had been put on board, and they accepted the onus of discharging the *prima facie* case.

The contentions put forward on behalf of the appellants by Sir Robert Aske were (i) that, though a loss happening through the sea coming through a hole in the ship and damaging the cargo is a peril of the sea if the hole be not one which was intentionally made with a view to scuttling the ship, still the fall of the cargo into the water through a hole not intentionally made would not be a peril of the sea, and (ii) that the facts were not within the exceptions, because the vessel was not seaworthy at the time of the loss, owing to the way in which she had been loaded. It is to be observed that "perils of the sea" in the contract which we have to consider included perils of the sea "wheresoever, including ports of loading, of whatever nature and kind soever."

In my judgment, the first contention is one that cannot possibly be accepted. It seems to me that it follows as a matter of course that, if, through the leaving of a port-hole open in the 'tween decks, water gets in and damages a cargo of rice, and this is a peril of the sea, it is equally a peril of the sea if a valuable part of the cargo should fall into the sea through a port-hole which had been left open during the voyage. With regard to the second contention, it seems to me that a temporary instability of the ship during the loading is not a breach of the undertaking that the vessel shall be fit. No doubt, if, by reason of some defect in the hull at the commencement of the loading, the vessel was unfit to carry the cargo which was put on board, this would be a breach of the warranty of seaworthiness, but it is not every defect that may arise, and which can easily be corrected before the vessel sails, that can be regarded as a breach of the warranty of seaworthiness. For this purpose, I refer to *Steel* v. *State Line S.S. Co.* (1), where LORD CAIRNS, L.C., points out, at p. 76, that the shipowner's engagement is that:

> the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform.

Owing to the ambiguity of the findings of the Scottish court, the matter was remitted to them to ascertain the true facts. In the course of his judgment, LORD CAIRNS, L.C., also said, at p. 78:

> . . . it appears to me obvious that what is here referred to as peril of the seas is, as described, something which happens on the transit, whether land or sea transit, and that of course does not commence until the ship leaves the port.

He further says, at p. 80:

> . . . it may be, that if the port-hole (still looking at this verdict alone) was unfastened at the time of the sailing of the ship, the port-hole may have been so situated and the access to the port-hole such as that at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened; and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken.

He says, at p. 82:

> It may, on the one hand, be that the port, if open when she left New York, was not occasioning any danger whatever to the ship so long as calm or moderate weather prevailed, and it may be that the port was so circumstanced that, upon any approaching change of weather, it might immediately have been closed and fastened down. . . .

It seems to me that the effect of the decision in *Steel* v. *State Line S.S. Co.* (1) is that a defect which after the voyage starts can readily and easily be cured does not amount to unseaworthiness at the material time. Upon the facts as proved in this case, this vessel was not unseaworthy at the time of the loss, because the overloading on the port side might quite easily have been rendered innocuous by balancing it by a sufficient load on the starboard side. For these reasons, I think that both branches of the argument of Sir Robert Aske on behalf of the appellants fail.

Great reliance was placed by Sir Robert Aske on the case of *Grant, Smith & Co. & McDonnell, Ltd.* v. *Seattle Construction & Dry Dock*

Co. (2), but that case seems to me to have no bearing on the present case, because there it was established that by the nature of its construction the dry dock was unfitted to bear the loads which it had to bear. I do not think that that case supports the appellants' arguments.

To sum up, I think that there was an implied warranty of seaworthiness at the time the ship started to load her cargo, but that there was no breach A
of this warranty, as the ship was in all respects fit to load the cargo. After the warranty of seaworthiness came into operation, when the vessel began to load, there occurred a peril of the sea from which the defendants were by the express terms of the bill of lading excused. The exception applied to the period of loading at the port of loading. We are not here concerned B
with any question of seaworthiness, or with any question of the exceptions in the bill of lading, after the vessel was fully loaded and had sailed. There was no want of seaworthiness then, and no loss incurred thereafter. It is worth while noting that the loss of the timber was due, not to its falling into the sea, but to its being carried away by the tide, or by C
currents in the bay, during a fog, so that it became a total loss. For these reasons, I am of opinion that this appeal should be dismissed with costs.

SLESSER, L.J.: I agree that this appeal fails. For the reasons D
stated by GREER, L.J., the sole question which falls to be considered upon this appeal is whether or not the loss was caused by perils of the sea. In my opinion, on the facts as found by the judge, he was entitled to come to the conclusion that this cargo was so lost. The list of the ship which caused the cargo to fall overboard was certainly a fortuitous acci- E
dent, not a necessary, nor even a probable, incident of the adventure. The perils of the sea are expressed in the contract to include ports of loading, and, therefore, it was not necessary that the ship should be on her voyage to fall within the exception in the bill of lading.

In *Stott (Baltic) Steamers, Ltd.* v. *Marten* (3), at p. 309, the facts were F
that a ship was being loaded in dock, and a boiler was swung over her side by a crane erected on another ship, when the boiler caught in the hatch-coamings, and fell into the hold, injuring the ship. LORD ATKINSON says, at p. 312:

> The loading of a ship with her cargo is no doubt in one sense a preparation for G
> her sailing . . . unless the accident which occurs in the course of those preparatory operations be occasioned by a cause similar to perils of the sea it is not covered . . .

He held that the breaking of the crane was not a cause similar to the perils of the sea any more than was the bursting of the air-chamber of the donkey-engine pump in the *Thames & Mersey Marine Insurance Co.* H
v. *Hamilton, Fraser & Co.* (4), for the damage must be of a character to which a marine adventure is subject: see LORD ELLENBOROUGH, C.J. in *Cullen* v. *Butler* (5), at p. 465. Here, on the other hand, I think that the loading of the ship was directly connected with her sailing, in that her loading and stowing was a necessary incident of the marine adventure.

I distinguish this case from *Stott's* case (3), because, in the language of VISCOUNT HALDANE in that case, at p. 309 :

> The accident which occurred was one which might happen in loading a railway truck just as much as in loading a ship, so far as its general character was concerned

Here, however, the damage was of a character to which the marine adventure was subject. It was fortuitous, in that no one could predict that the vessel would list while being loaded. It was, in the proper sense of the word, accidental, and not designed. Moreover, as I have pointed out, it is to be observed that in the present bill of lading dangers of the sea are expressly stated to include ports of loading.

The only authority which can be said at all to support the appellants' case is that of *Grant, Smith & Co. & McDonnell, Ltd.* v. *Seattle Construction & Dry Dock Co.* (2) in the Privy Council. But the analogy which their Lordships drew at p. 171 between that case and that of *Sassoon (E. D.) & Co.* v. *Western Assurance Co.* (6) shows that, in their view, if a vessel is unfit through her own inherent weakness to carry the cargo which she was loading, and if without accident or peril of any kind she were to sink in still water, it would not be a peril of the sea. LORD BUCKMASTER points out, at pp. 171, 172 :

> An insurance against " the perils of the sea or other perils " is not a guarantee that a ship will float and . . . had such a policy been affected it would not have covered a loss inevitable in the circumstances due to the unfitness of the structure, and entirely dissociated from any peril by wind or water.

Here, in my opinion, on the facts, as I have stated, the peril was caused inevitably by a peril produced during loading in port. I would apply to this case the definition of perils of the sea accepted by LORD BRAMWELL in *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser, & Co.* (4), at p. 492, namely :

> Every accidental circumstance, not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation.

SCOTT, L.J. : I agree that the appeal depends upon the proper interpretation of the exceptions clause in the bill of lading. The material facts can be stated shortly. The Stranna was on Feb. 14, 1935, chartered by the plaintiffs from her owners to load a cargo of sawn timber, including deck load, at Herring Cove, in New Brunswick. Thirteen bills of lading were there issued by the captain to the plaintiffs, in accordance with the charterparty, making the cargo deliverable at Belfast to their order. The action was brought for short delivery of a considerable portion of the deck cargo, which had been lost overboard at the loading port in the circumstances hereinafter appearing. The question of liability only was tried in the court below, it being agreed that the investigation into the question of quantity should be referred. The bills of lading stated that the deck cargo was " at charterers' risk," but there was no reference to negligence of the shipowners' servants in that context. There was, however, later in the document, a general exceptions clause, which excepted, *inter alia* :

> perils of the sea, fire, barratry, enemies, thieves, restraint of princes, collisions, stranding and all and every other dangers and accidents of the seas, rivers and navigation wheresoever including ports of loading . . . of whatever nature and kind soever . . . even when occasioned by negligence default or error in judgment of the pilot, master, mariners or other servants of the shipowners. **A**

The substantial question in the case was whether the defendants brought themselves within this clause.

For loading, the vessel lay out in the bay, at a distance of a mile-and-a-half from the shore, and the cargo was brought to her in motor-scows from the mill up-river. She was built in Glasgow in 1925, and was 250 ft. **B** long, of 39 ft. beam, 1,547 tons gross, with four holds and four hatches, and water-ballast tanks. She had been engaged for some years, as had her sister ship, in the carriage of timber cargoes. As the judge says in his judgment, no attack was made upon her seaworthiness. Neither in the statement of claim nor in the reply in answer to the defendants' plea **C** in the defence of the exceptions clause in the bills of lading was there any allegation of unseaworthiness, or unfitness of the vessel to receive and carry the cargo in question. The loading began on July 13, 1935, and the under-deck cargo was completed on July 19. The loading of the deck cargo proceeded from then until July 23. At 11.40 a.m. of that day, **D** there being only a comparatively small quantity still to load, the captain went ashore to sign the bills of lading. The height of the deck cargo was then about 14 ft. on the fore-deck, and 13 ft. on the after-deck, the ship's draft being 17 ft. 7 ins. forward and 18 ft. aft. The ship was then upright. According to a statement by the chief officer (who remained on board), **E** admitted as evidence by consent of the plaintiffs, this is what happened. During the captain's absence, shortly before 1 p.m., the vessel slowly listed to port 20° to 25°. The vertical stanchions of wood erected to contain the deck cargo then, under the resulting pressure on the port side, broke off short along part of the ship's length, and part of the deck cargo **F** thus unsupported shot overboard into the water. The centre of gravity of the deck load being by this removal of weight on the port side of the mid-ship line shifted to the starboard side, the ship then swung back and over to the opposite side, listing to starboard so far as to submerge the mid-ship deck, with the result that the increasing weight of the deck **G** cargo caused the wooden stanchions along the whole length of the ship on that side to break off short, and a still larger portion of the deck cargo shot into the sea on that side. A strong tide was running at the time, and there was also a thick fog. The consequence was that all the cargo in the water was carried away by the current, and none recovered. **H**

The master put forward a theory that the list to port was caused by the interaction of two tidal currents. It was about the turn of the ebb at the time, and he thought that the flood current set up against the starboard side of the ship for a depth of half the ship's draft, and that below that level the ebb was still running in the opposite direction. The result of this was, in his view, to cause a mechanical couple of opposite forces and to produce on the ship an upsetting movement to port. But there seemed to be no solid foundation for this theory, and the judge, having heard it, and having had the advantage of two first-class surveyors and marine engineers in the box—Mr. Camps for the defendants, and Mr. Flannery for the plaintiffs—disbelieved it. The seaworthiness of the ship—that is, her fitness to receive and carry such a cargo—not being attacked, the only explanation left was necessarily some mistake in her loading. What the mistake was never really came to light. There was much discussion with the witnesses upon the theory of stability, but it was very confused. The data for any stability calculations were wholly lacking. If it were necessary to come to a definite conclusion on the questions relating to stability before a judgment could be given on the issue between the parties, a new trial would be necessary, as it is quite impossible to form any clear idea of what the position really was in that respect from the transcript of evidence. But I do not think that it is at all necessary, and I do not believe that any new trial would now reveal the relevant facts. I doubt, for instance, whether the truth was told either about the ballast-tanks or about the inclination of the ship from the vertical when the lifts of timber were made from the scow alongside during the last morning. One broad fact is, however, plain. At the moment when the ship listed the 20° to 25° to port, after having remained practically upright for some time, she must already have had her centre of gravity raised unduly, so as to bring it up to, or actually above, her metacentre, or, in popular language, so as to make her top-heavy. This must have been brought about by some mistake in the loading, most probably by mis-management of her ballast-tanks, that is, by omission to give her enough weight low down. Unfitness of construction of the ship for the carriage of such a deck cargo being ruled out, some wrong distribution of weight in the process of loading is the only possible mechanical explanation of what happened. I desire to make it clear that I do not myself see in the case any evidence of any cause of the casualty other than a mistake in loading, including in that word the management of the ship during loading.

The legal position which results is simple. If what happened falls within the descriptive words of the earlier part of the exceptions clause, as a peril of the sea or some one or other of the more general causes of loss there expressed, the defendants are protected, for the latter part of the clause prevents their losing the protection even if the happening of the peril was brought about by the negligence of their servants. I have already quoted the relevant words. The judge went through all the more important decisions, and has given a carefully considered judgment. I agree with his analysis of the cases, and do not therefore think it necessary to examine them in detail over again.

In my view, what happened was a loss by a peril of the sea, and none the less so because it was the negligence of those who were concerned with the work of loading the ship that brought the peril into operation. It was argued by Sir Robert Aske that, if the listing of the ship was caused by bad loading, that very fact excluded the idea of a peril of the sea, his contention being that the meaning of that phrase in the English language, or at any rate as judicially defined, restricts it to cases where the damage to ship or cargo by the sea, or sea-water, arises through external causes, such as wind and weather, or striking a rock, or where sea-water actually gets into the ship. I do not agree. Even apart from the wider expressions in the clause which come after "perils of the sea," it is, in my opinion, an appropriate use of the English language to say that, on the facts of the present case, the timber was lost by a peril of the sea. The fortuitous aspect of the meaning of the word "peril" in a contract either of carriage or of insurance is plainly satisfied by the evidence. As the judge points out, so far as the defendants' servants were concerned, the event was wholly unexpected; it was just an unfortunate accident. But it was also a peril *of* the sea, and not merely a peril *on* the sea. It could not have happened on land. It was a happening which is characteristic of the sea, and of the behaviour of ships. Nothing but a ship, waterborne, and moving freely under the two forces of gravity and buoyancy, could have listed as the Stranna did, which caused her wooden supports to break off as hers did, and her cargo to be irretrievably lost in the fog and the tidal current, as hers was lost. The liability of a ship floating in the sea, and free to respond to the changing interaction of the forces of gravity and buoyancy as the cargo is loaded, and thereunder to list sideways, and so to cause a sudden loss of deck cargo, is, in my opinion, essentially one of the sea risks to which maritime commerce is exposed. It falls within the passage in the opinion of LORD HERSCHELL in the *Thames and Mersey* case (4), at p. 498, which LANGTON, J. cites in his judgment at p. 387: it is "damage of a character to which a marine adventure is subject," and therefore a loss by such an event is a loss by a peril of the sea.

If this reasoning be sound, the other perils in the clause do not matter. If, contrary to my opinion, there be any doubt about the facts being covered by the phrase "perils of the sea," it is to be observed that the other phrases used in the clause are wider still:

> All and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . of whatever nature and kind soever.

In a commercial document like a bill of lading, it would be contrary to the ordinary use of language by commercial men to interpret these wider expressions as insufficient to cover the facts of this case.

There is one other point which calls for notice. It was argued by Sir Robert Aske—perhaps a little faintly—that, if by the negligence of the defendants' servants the ship was brought into a condition of unstable equilibrium, the result was a breach of the warranty of seaworthiness. This answer, however, rests on a misapprehension of law. Whilst there is a warranty, when loading begins, that the ship is fit to receive the cargo, and also a warranty, on sailing, that she is fit to carry the cargo loaded in her, there is no intermediate warranty between the two. Negligence in the loading causing a loss before the loading is complete does not constitute a breach of any warranty. For the above reasons, I agree that the defendants established a good defence under the bill of lading contract, and that the appeal must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Waltons & Co.* (for the appellants); *William A. Crump & Son* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* CULL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Lord Romer and MacKinnon, L.J.), **December 6, 7, 8, 1937, January 31, 1938.**]

Income Tax—Dividends—Sur-tax—Dividend paid "without deduction of tax"—Nil assessment upon company—Sum set aside to meet future tax on sum paid as dividends—Whether net or gross sum—Finance Act, 1931 (*c.* 28), *s.* 7.

The appellant was the holder of 20,000 ordinary shares in a company upon which for the year ending Mar. 31, 1934, a dividend of 21*s.* per share was declared "without deduction of tax," the appellant therefore receiving £21,000. The company had incurred losses in previous years with the result that it was not liable to be assessed to tax under Sched. D for the year ending Apr. 5, 1934. The dividend paid to the appellant had been paid out of a sum of £559,374 2*s.* 1*d.*, in respect of which a sum of £99,114 9*s.* 7*d.* had been put to reserve as a provision for the payment of income tax thereon in a subsequent year. The question at issue was whether the appellant ought to be assessed for the purposes of sur-tax upon £21,000 or upon that sum "grossed up" to £28,000, the standard rate of tax being 5*s.* in the £:—

HELD [LORD ROMER dissenting]: the payment of the dividend "without deduction of tax" was the same in effect as the payment of the dividend "tax free." The £21,000 was a net sum, and for the purposes of assessment to sur-tax it should be "grossed up."

[**EDITORIAL NOTE.** The judgments herein deal very fully with the system of deduction of tax from dividends, and the defects of that system are explained and criticised. The main question that arises in this case is whether a sum of money available for distribution is a "gross" sum or a "net" sum. The peculiarities of the sum here in question are: (i) it was an amount of profit upon which in the particular year no income tax was payable by the company on account of losses in previous years; (ii) in fact, a sum had been set aside to meet any liability for income tax in respect of this profit in succeeding years. The main point upon which a difference of view arose was whether there is any distinction between the phrases "tax free" and "without deduction of tax." This leads to the further question as to whether the company by choosing to use either one or other of these phrases can alter the shareholder's liability to sur-tax.

AS TO INCOME TAX ON DIVIDENDS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 249-255, paras. 504-518; and FOR CASES, see DIGEST, Vol. 28, p. 82, Nos 463-468.]

Cases referred to:

(1) *Gold Fields American Development Co., Ltd.* v. *Consolidated Gold Fields of South Africa, Ltd.*, [1926] Ch. 338; 28 Digest 94, *556*; 95 L.J.Ch. 329; 135 L.T. 14

(2) *Neumann* v. *Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332.

(3) *Hamilton (F. H.)* v. *Inland Revenue Comrs.*, [1931] 2 K.B. 495; Digest Supp.; 100 L.J.K.B. 693; 145 L.T. 303; 16 Tax Cas. 213.

(4) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.* S.C., [1930] 1 K.B. 304.

(5) *Inland Revenue Comrs.* v. *Pearson, Inland Revenue Comrs.* v. *Pratt,* [1936] 2 K.B. 533; [1936] 2 All E.R. 731; Digest Supp.; 105 L.J.K.B. 639; 155 L.T. 351.

(6) *Bradbury* v. *English Sewing Cotton Co.*, [1923] A.C. 744; 28 Digest 81, *445*; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481.

(7) *A.-G.* v. *Metropolitan Water Board,* [1928] 1 K.B. 833; Digest Supp.; 97 L.J.K.B. 214; 138 L.T. 346; 13 Tax Cas. 294.

(8) *Brooke* v. *Inland Revenue Comrs.*, [1918] 1 K.B. 257; 28 Digest 105, *654*; 87 L.J.K.B. 279; 118 L.T. 321; 7 Tax Cas. 261.

(9) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood,* [1921] 2 A.C. 171; 28 Digest 107, *663*; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

(10) *Gimson* v. *Inland Revenue Comrs.*, [1930] 2 K.B. 246; Digest Supp.; 99 L.J.K.B. 532; 143 L.T. 704; 15 Tax Cas. 595.

APPEAL from a decision of FINLAY, J., dated June 16, 1937. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R. FINLAY, J., in his judgment stated that he was guided by the decision of LAWRENCE, J., in *Inland Revenue Comrs.* v. *Pearson, Inland Revenue Comrs.* v. *Pratt* (5), but that he did not think that, had he not been guided by that case, he would have come to any different conclusion.

The Attorney-General (*Sir Donald Somervell, K.C.,*) and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., and *Terence Donovan* for the respondent.

SIR WILFRID GREENE, M.R.: The appellant is the holder of 20,000 ordinary shares in Cull & Co., an unlimited company incorporated under the Companies Acts. On Mar. 13, 1934, the directors of the company declared an interim dividend on its ordinary shares for the year ending Mar. 31, 1934, of 21*s.* per share "without deduction of income tax." The appellant was assessed to sur-tax for the year ending Apr. 5, 1934, and for the purpose of the assessment the special commissioners added to the amount of the ordinary dividend which had been credited to him —namely, £21,000—a sum of £7,000 as representing income tax in respect of the dividend. The addition of income tax to a net dividend for the purpose of sur-tax assessment is commonly referred to as "grossing up" the dividend, and in this judgment I will use this convenient though ill-sounding expression. The appellant appealed against the assessment, upon the ground that, as the dividend had been declared "without deduction of income tax," it was not legitimate to gross it up, that process being (in his contention) permissible only in cases where income tax is deducted from the dividend. The special commissioners allowed his appeal, but their decision was reversed by FINLAY, J., from whose judgment the present appeal is brought.

Before I proceed to consider the question raised by the appeal, certain
A facts must be stated with regard to the company's accounts. The company's profit and loss account for the year ending Mar. 31, 1934, showed a net profit of £559,374 2*s.* 1*d.* In the years immediately preceding, it had traded at a loss, the accumulated losses being £239,188 3*s.* 2*d.*, and as the result of this position the company was not
B liable to be charged to income tax under Sched. D for the year ending Apr. 5, 1934. The balance standing to the credit of profit and loss account as at Mar. 31, 1934, after deducting these accumulated losses, was £320,185 3*s.* 2*d.*, of which £20,000 was transferred to reserve, £105,000 was utilised in paying four years' preference dividends on the preference
C shares of the company, while the ordinary dividend exhausted a further £105,000, leaving £90,185 18*s.* 11*d.*, to be carried forward. Before arriving at the profit and loss figure of £559,374 2*s.* 1*d.*, provision was made for income tax in the sum of £99,114 9*s.* 7*d.* This sum was intended to form a reserve against income tax which would become chargeable
D in respect of the next financial year. The making of this provision was not a deduction of income tax from the dividend declared, and for present purposes it may, upon my view of the case, be disregarded. Equally irrelevant is the fact that during the year in question the company received dividends on investments from which tax was deducted at the
E source. The only fact of importance which emerges from the accounts is that the company had ample funds to enable it, if it had so desired, to declare a dividend of 21*s.* per share on its ordinary shares "tax free." If the declaration had taken this form, it would admittedly have been equivalent to the declaration of a dividend of such an amount as, after
F deduction of income tax, would have produced a net dividend of 21*s.*, payment of 21*s.* would have been a payment after deduction of tax, and it would have been necessary for sur-tax purposes to gross up the 21*s.* by adding to it the amount of the tax so deducted: *Gold Fields American Development Co., Ltd.* v. *Consolidated Gold Fields of South*
G *Africa, Ltd.* (1).

The question which arises on this appeal is whether or not, upon the true construction of the relevant statutory provisions, and in the circumstances of the case, the declaration and payment of the dividend were in law equivalent to the declaration and payment of a dividend of 21*s.*
H "tax free," notwithstanding that upon its face the declaration purported to be a declaration of a dividend of 21*s.* "without deduction of tax." The contention of the appellant can be concisely stated. It is that a company is entitled to deduct or not to deduct tax at its option; that the question which alternative it has chosen is to be decided by reference to the action of the company itself; that in the present case the declara-

tion, upon its true construction, demonstrates that the company has elected not to deduct tax; and that, under the relevant statutory provisions, a dividend may only be grossed up for sur-tax purposes where the company has in fact deducted tax. In support of this conclusion, it is said that, whereas, when the company deducts tax, the share of profits which the shareholder receives is for tax purposes a previously existing gross sum of which the Crown is to be treated as having received a part, yet, when no tax is deducted, the shareholder cannot be treated as having received a gross sum, since no such gross sum ever existed, or can be treated as having existed.

The application of the provisions of the Income Tax Acts relating to dividends paid by incorporated companies is a subject which bristles with difficulties. They originate in the Income Tax Act, 1842, s. 54. At the date when that Act was passed, there was some excuse for the apparent simplicity of the section, but, with the growth of limited companies, difficulty after difficulty appeared. The section contemplated a very simple procedure. The tax was charged on the " body of persons " who in due course would divide up the balance of its profits which remained after payment of the tax. Upon such division, the persons entitled to share in the profits were to be bound to allow out of the dividend " a proportionate deduction in respect of the duty so charged." But the section applied to all bodies of persons, whether incorporated or unincorporated. In the case of unincorporated bodies, no particular difficulty appears to have presented itself. This was far from being the case with incorporated bodies. In its application to these latter bodies, the section could work only if some method could be found of reconciling two fundamentally different conceptions—namely, that of a body of persons paying a share of profits to the persons entitled to those profits as such, and that of an incorporated body of persons paying dividends to its members, who have no right to the profits as such at all. A dividend paid by a limited company to its members is in its nature quite different from a share of profits. This fact arises from the very circumstance of incorporation. But the section treats that circumstance as irrelevant, and provides no method of resolving the fundamental antinomy. The fact that dividends are often paid in whole or in part out of profits of past years, changes in the rate of tax, the operation of the statutory provisions for measuring profits by reference to the results of previous years, raised questions which have puzzled the revenue, the companies concerned and the courts. The legislature, instead of starting afresh with a logical system, has contented itself with patchwork designed to deal with particular difficulties as they emerged. Thus the Finance Act, 1927, s. 39, dealt with the difficulty caused by differences in the rate of tax. The Finance Act, 1931, s. 7, dealt with the difficulty caused by the fact that dividends may be paid out of the profits of a year in which the profits as assessed to tax are nil, or less than the actual profits divided. There is also a strong body of opinion in favour of the view that the law was altered in 1918 when r. 20 of the General Rules was substituted for sect. 54 of the Act of 1842: see *per* LORD TOMLIN in *Neumann* v. *Inland Revenue Comrs.* (2), at p. 360, *Gold Fields American Development Co., Ltd.* v. *Consolidated Gold Fields of South Africa, Ltd.* (1) at p. 347, *Hamilton (F.H.)* v. *Inland Revenue Comrs.* (3), *per* LORD HANWORTH, A M.R., at p. 228, *per* LAWRENCE, L.J., at p. 233.

The resulting scheme of legislation might appear to have succeeded in providing a practical solution of the fundamental antinomy to which I have referred. A company pays tax on its profits measured by the rules for the time being in force. It pays a dividend out of its profits. B In making the payment, it is entitled to deduct tax at the standard rate current at the time, irrespective of the rate of tax prevailing when the profits were made, and irrespective of the fact that for the year in which the dividend is paid the profits as assessed to tax may be nil, or less than the actual profits of the year used for payment of the dividend. C The shareholder, for all purposes of his return of total income, is treated as having received a dividend equal to the net amount plus the tax deducted. That is, his dividend is grossed up by adding back the tax.

This scheme is sufficiently well adapted to work in the ordinary case where dividends are paid less tax, or "tax free," and it might have been D thought that all troubles were at an end. This was not so, for a problem of great difficulty arose almost at once in *Neumann's* case (2). It is upon the decision in that case that the argument of the appellant is based, for it is said on his behalf that *Neumann's* case (2) laid down a general rule to the effect that the provisions as to grossing up contained E in the Finance Act, 1931, s. 7 (2), apply only when tax is in fact deducted by the company, and that, as in the present case no tax was deducted, there can be no grossing up. The decision in *Neumann's* case (2) must accordingly be examined with care. But, in order to make any such examination intelligible, it is necessary to have in mind the language F of r. 20 of the General Rules and the Finance Act, 1931, s. 7, which I accordingly quote. Rule 20 is as follows:

> The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate G thereto.

The Finance Act, 1931, s. 7 (1), is as follows:

> The provisions of r. 20 of the General Rules, which authorise the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged H to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period.

Subsect. (2) states:

> Subject as hereinafter provided, a dividend paid by a body of persons, whether

before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in subsect. (1) of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of the said r. 20, be equal to the net amount received: Provided that the provisions of this subsection shall not apply to a preference dividend to which the Finance Act, 1930, s. 12, applies, and shall have effect subject to the provisions of subsect. (3) of that section. A

In order to understand *Neumann's* case (2), it must be remembered that the question which it raised flowed directly from the decision in the *Salisbury House* case (4). The company made profits out of the rents received from tenants largely in excess of the Sched. A assessment. The Crown in the *Salisbury House* case (4) claimed that these excess B profits were assessable, but the claim was negatived by the courts, upon the simple and, one would have thought, obvious ground that the Sched. A assessment covered all the profits derived from ownership of land, and the fact that the actual profits might exceed or fall below the figure of the assessment was immaterial. C

If the property in question in that case had belonged to an individual, no difficulty would have arisen with regard to his sur-tax assessment. He would have included in his return of total income the amount of the Sched. A assessment, and nothing more. But, as the owner was a limited company, the old difficulty once again raised its head. The D company distributed two dividends. Upon the first of these, an amount equal to the Sched. A assessment was distributed under deduction of tax. The second distribution was made out of a sum set aside in the accounts to represent surplus rents in excess of the Sched. A assessment. Upon this distribution no tax was deducted. The Crown claimed to be E entitled to have the amount of the second dividend grossed up. The taxpayer claimed that he was not liable to be assessed to sur-tax at all in respect of the second dividend. Neither claim succeeded. It is with the decision on the Crown's claim that we are primarily concerned. With regard to the decision upon the taxpayer's claim, it is only necessary F to point out in passing that the result necessarily flowed from the antinomy to which I have referred and the patchwork provisions enacted by the legislature in order to remove the more glaring difficulties to which it led. In the result, a fund of profits which, if received by an individual, would have been measured and franked for all tax purposes G by the Sched. A assessment, when passed through the company, and used to pay a dividend to its shareholders, attracted sur-tax in their hands. The legislature had apparently failed to remember and make provision for the special nature and effects of Sched. A in the case of land-owning companies. In consequence, the shareholder in such a H company is subjected to a burden which individual landowners are not called upon to bear.

But, upon the question of grossing up, the House of Lords was able to construe sect. 7 (2) so as to avoid a result which, in the words of Lord Tomlin, would have been "repellent to most minds." The effect of grossing up the second dividend would have been to treat the company as having had a larger sum to distribute than it in fact had, and to treat the shareholder as having received, in the shape of cash and tax, a sum greater than he did so receive. In paying the second dividend, the company exhausted the excess rents, and to have treated the dividends paid as representing a larger gross sum from which tax had been deducted would have been to fly in the face of the facts. There never was in fact a deduction. There could not have been a deduction once it was decided to distribute the whole of the excess rents in cash among the shareholders.

I apprehend that the same result would have followed if the company had distributed in one dividend the whole of its profits from rents which remained in its hands after payment of the Sched. A tax. In that event, it would have distributed a "net" amount, for it would have "deducted" tax—namely, an amount equal to the Sched. A tax which it had itself borne. But to have grossed-up the dividend actually received by adding back a larger sum for tax would again have involved the false assumption that the fund available for distribution was greater than it in fact was. Some of the expressions used in the opinions delivered do not perhaps fit such a case, but I cannot bring myself to believe that the result would have been different. If the language of General Rule 20 were the same as that of sect. 54 of the Act of 1842, the solution of these problems would have been simpler, for the deduction of the Sched. A tax from the dividends would have been "a proportionate deduction in respect of the duty so charged." It is open for the consideration of the House of Lords whether the difference in language has the result which it is said to have in the authorities to which I have referred in an earlier part of this judgment.

The manner in which the actual problem in *Neumann's* case (2) was solved can best be seen by quoting the actual words of the opinions delivered by the House. LORD TOMLIN said, at p. 364:

> The question, however, remains as to the figure at which it is to be brought in. I think it would be repellent to most minds that the appellant should be charged as a part of his income with a sum which not only has never come to him but has never existed in fact. It is plain that the respondents' cross-appeal, which seeks to treat the sum of £4,275 as a net sum, corresponding to a gross sum of £5,343 15*s.*, assumes that the amount divisible by the company was something in excess of anything it ever had to divide. It is said, however, that the Finance Act, 1931, s. 7 (2), compels the conclusion that the sum of £5,343 15*s.* is the correct figure to be brought into computation. I do not think that the effect of the statutory provision is as contended for by the respondents. The subsection, in effect, provides that it is the gross amount before deduction which is to be treated as the income for the purposes of the Acts. If a deduction from the gross sum was authorised but was not in fact made, as was the case here, there is, in my opinion, nothing in the language of the subsection which entitles the inland revenue to treat the gross sum as being greater than in fact it was. From the income tax point of view, it makes no difference to the revenue whether the deduction is made or not, because the company does not have to account for what it deducts.

LORD WARRINGTON OF CLYFFE said, at p. 366:

> This brings me to the second question, namely, at what figure is the dividend to be brought in? Here, again, I agree with my noble and learned friend. In

> such a case as this, namely, where no deduction is in fact made, there is no distinction between a gross sum and a net sum. The actual sum paid, and not some wholly fictitious sum, is, therefore, that which should be included in the return of income.

Lord Wright said, at p. 373:

> But the present case has proceeded on the basis of a specially segregated fund, the whole of which was distributed without any deduction for tax, nor was the dividend, in fact, nor could it be, described as "tax free," a phrase which is used to indicate that the dividend is net and under prior deduction of tax. Such a case as the present is unusual, because a fund has been segregated and divided *in toto*; hence, if the company had deducted tax, it would have been from a gross amount, not of £5,343 15*s*., but of £4,275, and equally, if the dividend had been "tax free," it would have been a dividend of the net amount after the appropriate deduction of tax had been made from the sum of £4,275. Furthermore, in the company's hands, no greater sum in respect of this fund was chargeable to income tax than £18,325, of which £4,275 was the appellant's *aliquot* proportion. What was distributed—being £4,275—was, in my judgment, the gross amount; the company, though authorised to deduct tax from it, was not bound to deduct it and did not in fact do so. I cannot see any justification for describing the sum distributed as a "net amount" and, hence, I conclude that sect. 7 (2) does not apply. I cannot treat the word "net" as mere surplusage, or as simply meaning the actual amount, whether gross or net.

It is not surprising that the language used in these passages should have led to the argument that in no case where tax is not in fact deducted on payment of a dividend can there be a grossing up under sect. 7 (2), for the expressions used are general in character. But so to construe them would lead to very far-reaching results which the legislature can scarcely have intended. For every company, by stating in its dividend declaration that no tax is to be deducted, could free its shareholders from a substantial liability to sur-tax which they would have incurred if precisely the same amount of cash had been paid to them under a declaration of dividend "tax free." If that is the effect of the decision in *Neumann's* case (2), it must be loyally followed. But I cannot bring myself to think that the members of the House of Lords intended by the language which they used in a very special case to produce such sweeping consequences.

There is, in my opinion, a fundamental difference between the facts in *Neumann's* case (2) and those in the present case—namely, that in the present case the fund of profits available for distribution was more than sufficient to provide a sum equal to the cash actually distributed plus the tax thereon. That is, the company could have declared a dividend of 21*s*. per share "tax free" without in any way departing from the realities of the case. As has already been pointed out, this could not have been done in *Neumann's* case (2), since to have done so would have involved the assumption that the company had made more gross profits than it in fact had made. It is in reference to this essential fact that the language in *Neumann's* case (2) was used. It was this fact that made it impossible to describe the amount received by the shareholder in that case as a "net amount."

But it is said that it is equally impossible to describe as a "net amount" the amount received by the appellant in the present case, since no tax was deducted, and it is only when tax is deducted that the amount received by the shareholder can properly be described as a "net amount." The argument is an attractive one, and I feel its force. But it appears to me to depend upon an assumption as to the meaning of the word "deduct" the correctness of which I will endeavour to examine. That assumption is that, in order that there may be a deduction, there must be in terms or by conduct an exercise by the company of the right to deduct which is said to be given to it by General Rule 20.

The word "deduct" in r. 20 does not mean that some specific sum is to be taken away and set apart, any more than does the same word in General Rule 19. When the latter rule says that the person paying yearly interest shall be "entitled to deduct and retain thereout a sum representing the amount of the tax thereon," it means merely that the payment of the net sum is to be a good discharge as between payer and payee. The language used in r. 20 is similar to that used in r. 19. If a company declares a dividend at the rate of £5 per cent. on its ordinary capital, it obtains a good discharge from the shareholder in respect of the debt so created if it pays £5 less tax. There is no need to refer to tax in the declaration. Indeed this is never done in practice, save where the dividend is declared "tax free," which is nothing more than a convenient formula for declaring a larger gross dividend. The right to deduct, therefore, does not arise by virtue of something in the declaration. It comes into effect on payment, and the shareholder cannot complain of its exercise. If a shareholder "refuses to allow" the deduction (whatever that may mean), he, like the recipient of interest under r. 19 who makes a similar refusal, is liable to a penalty under General Rule 23 (1).

In the case of an unincorporated body of persons "making a dividend of" its profits (to use the language of sect. 54 of the Act of 1842 and r. 20), sect. 54 compelled the persons entitled to the profits to "allow out of" their dividends "a proportionate deduction in respect of the duty so charged" in respect of the profits of the body of persons. Accordingly, if such a body made £1,000 profits and paid tax at 1*s.* in the £ thereon, and then proceeded to divide the balance among the persons entitled, they necessarily performed the operation of deduction by distributing the net sum. No declaration to that effect was needed. The mere payment of the net sum in cash was payment under deduction of tax.

In my opinion, the essential character of the act of "deduction" has remained the same, notwithstanding the fact that, under the law as it at present stands, the tax "deducted" from the dividend is not necessarily comparable with the tax paid or to be paid by the company in respect of the profits out of which the dividend is paid. It is indeed this latter circumstance which appears to give to the word "deduction" a concrete meaning, which requires some specific act of deduction to be done. This appearance is accentuated by the provisions of the Finance Act, 1924, s. 33 (1), which requires a company to show the gross and

net amounts on the counterfoil of the dividend warrant, although I do
not think that there is anything in that subsection which is inconsistent
with the view which I have expressed as to the meaning of deduction.

If a company, having a fund of profits in respect of which it has paid
tax, declares a dividend at a rate which exhausts the balance remaining
after payment of the tax, and then proceeds to pay the dividend at the A
actual rate declared, it has " made a dividend " of its net profits, and
in doing so has (as it appears to me) of necessity " deducted " tax, at
any rate where there is no difference in the rate of tax. Similarly, if
the dividend does not exhaust the balance, the company will, in my
opinion, merely have paid a " tax-free " dividend. In each case, the B
dividend would have to be accompanied by the statement required by
sect. 33 (1) of the Act of 1924, and would have to be grossed up for sur-
tax purposes under sect. 7 (2) of the Act of 1931. The amount received
by the shareholder would, in my opinion, be a " net amount " within the
meaning of both provisions, for it has been paid out of the net balance C
of a fund of profits which has borne tax, and the aggregate of the divi-
dends actually paid is in fact less than the gross fund before tax was
paid out of it by at least the amount of tax paid in respect of those
profits.

The next case to be considered is where the tax falls to be deducted D
from the dividend at a rate higher than that in force when the profits
out of which the dividend is paid were made. An example will make
the point clear. Suppose a company makes £1,000 profit on which it
pays tax at 4*s*. in the £, leaving £800. In a subsequent year, when the
rate of tax is 5*s*. in the £, it declares a dividend at a rate which will E
exhaust £600, and then proceeds to distribute the whole of the £600
without deducting any sum in respect of tax. It appears to me that
in such a case it has in law paid a tax-free dividend, and that no language
in the declaration can alter this fact. For the £600 plus tax (which at
5*s*. would amount to £200) would be no more than the actual net fund F
available for distribution, and it would not be possible to say, as was
said in *Neumann's case* (2), that the operation of grossing up would
involve assuming the existence of a sum which never in fact existed.
In other words, the amount received by the taxpayer would be of neces-
sity a net sum, and no express or implied intention to deduct would be G
required to make it such, nor could any declaration of intention not to
" deduct " make it anything other than a net sum.

In a case falling under the second alternative in sect. 7 (1) of the Act
of 1931, the position is more complicated, since that alternative deals
with the case where dividends are paid (as in the present instance) out H
of profits which will come into computation only in a year subsequent
to that in which the dividend is paid. In such a case, the profits have
not borne tax, and there is nothing in law to prevent the company from
distributing the whole of them without deduction. I must confess that
the case of such a distribution presents a difficulty, and it may be that

it would be impossible to treat the dividend as a " net " dividend within the meaning of subsect. (2). But that is not this case. Here the dividend declared and paid, plus an amount equal to tax at the standard rate, amounted to far less than the actual profits, and I see no difficulty in regarding the amount received by the shareholder as a net amount.

I have endeavoured to the best of my ability to construe the relevant provisions in the light of the decision in *Neumann's* case (2), and to confine that decision to the sole point which, in my judgment, it was intended to cover. If my reasoning is unsatisfactory, my excuse must be that the whole system of deduction of tax from dividends is illogical from top to bottom, and any attempt to make it logical is necessarily open to criticism.

It only remains to say a word in reference to the case of *Inland Revenue Comrs.* v. *Pearson, Inland Revenue Comrs.* v. *Pratt* (5), which was relied upon by Finlay, J., in his judgment in this case. In that case, dividends were paid out of accumulated profits, and the amount paid was the actual amount declared. The shareholders claimed that the sums received were gross amounts, and ought not to be grossed up for sur-tax purposes. The special commissioners took this view, but their decision was reversed by Lawrence, J. In my opinion, those cases were correctly decided, although I am not sure that I quite agree with the whole of the reasoning of Lawrence, J. In the main, however, I do not think that his view differs from my own. The appeal must be dismissed with costs.

Lord Romer [read by Sir Wilfrid Greene, M.R.]: I regret to find myself in disagreement with the other members of the court. In this case, the court has once more to consider the relative positions under the Income Tax Acts of a shareholder and his company in respect of the dividends that are paid to him from time to time.

Before the decision of the House of Lords in *Neumann's* case (2), there were some people, and I fear that I was one of them, who erroneously thought that the position of the shareholder was analogous to that of a debenture holder of the company in relation to the debenture interest. Being a legal entity entirely distinct from the entity of the company, it was thought that in reference to the dividends he was one taxpayer, and that, in reference to the profits of the company out of which the dividend was paid, the company was another and distinct taxpayer. If this had been the correct view, the shareholder would have been directly assessable to tax in respect of his dividends where the profits out of which they were paid were not brought into charge, the company only being entitled (although not bound) under r. 20 of the General Rules applicable to all schedules to deduct the tax from the dividends when the latter were payable out of profits that had been brought into charge. In this respect only he would have differed from the debenture holder, the company being (under r. 21) bound to deduct the tax from his interest when payable out of profits not brought into charge.

It was, however, held in *Neumann's* case (2) that this is far from being the true position of the shareholder in relation to a dividend of a trading company. It was there held that the shareholder is never assessable in respect of the dividend, and that his true position is that which it had been stated to be by Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co.* (6). There, in reference to a company paying a dividend to its shareholders, he said, at pp. 769, 770 :

> If the principle of its being a distinct person, distinct from its shareholders . . . had been carried to a logical conclusion, there would have been no reason why each shareholder should not, in his turn, have to return as part of his profits or gains under Sched. D, the money received by him in dividends. Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently, proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principle as modifying the statute ; it is founded upon the provisions of the statute itself ; and the statute carries the analogy of a partnership further, for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income tax or pays at a lower rate, can get the income tax which has been deducted on the dividend warrant returned to him.

The principle of treating the shareholder, for revenue purposes, as if he were a partner with his co-shareholders, if carried to its logical conclusion, would render it improper for a company ever to deduct tax on paying a dividend. For, if a partnership pays no tax on its profits, a partner's share cannot be diminished by deduction of tax. If, on the other hand, the partnership does pay income tax on its profits, all that can be distributed amongst the partners will be the net profits left after payment of the tax, and no further deduction for tax can be made, and this is true whether the whole or only a portion of the net profits are distributed. The principle would also lead to the logical conclusion that, for the purpose of grossing up a dividend for sur-tax purposes, it would be necessary to ascertain what was the average rate of tax paid by the company on the whole of its profits that had been divided, and to gross up at the rate so ascertained. But the legislature unfortunately thought it right by r. 20 to give a company an express power to deduct tax when paying dividends out of profits and gains " to be charged." I say unfortunately because the rule, particularly in view of its later developments, has given rise to some difficulty. This is due to the fact that a company, when distributing net profits by way of dividend, does not in truth deduct tax from the dividends at all, even though it should purport so to do. The deduction of tax has already been made when ascertaining the net profits. Should the company therefore purport to deduct tax from the dividends, the only result would be that it would distribute less of its net profits than it would do were no such deduction made. The sum deducted will be retained by the company, and will be available for distribution as net profits in a subsequent year. A deduction of tax would no doubt be necessary if the company purported to be distributing by way of dividend the whole of its gross profits. But in such a case the so-called dividend of gross profits would not really be a dividend in the sense in which the word is used in r. 20. For the company cannot properly distribute its gross profits among its shareholders. All that the company would in fact be doing by going through the form of declaring the gross dividend and paying it less tax would be to be intimating to its shareholders for sur-tax and abatement purposes what dividend they would have received had the gross profits been divided. The truth is that, when enacting r. 20, the legislature failed to bear in mind what has now been determined to be the true relative positions of a company and its shareholders for revenue purposes, and gave power to a company to deduct tax from the net dividend as though it resembled for tax purposes interest on its debentures. The rule, however, must be read as applying to a dividend regarded as a distribution amongst partners of the net profits of the concern, and, so read, it gives a company no power that it would not possess had the rule never been enacted. For obviously a company can deduct tax from its gross profits before paying a dividend, the shareholders being entitled to nothing more than the net profits. Equally obviously, a company can deduct the tax, if it thinks fit to do so, from the net profits, though the only effect of doing so will be, as I have already pointed out, to diminish the amount of net profits being distributed. The result would seem to be that, whenever a company declares a dividend of its gross profits, tax will, of course, be deducted, and the net dividend must be grossed up for sur-tax purposes, and that, when the company declares a dividend of its net profits, the dividend must always be grossed up for sur-tax purposes, whether the company does or does not purport to deduct the tax, unless the dividend is being paid out of profits that are not chargeable with tax at all.

I have so far treated the case on the footing that the only relevant statutory provisions are those to be found in the Act of 1918. But the Finance Act, 1927, s. 39, provides that the deduction from a dividend that a company may make is a deduction of tax at the standard rate for the year in which the amount payable becomes due. This, again, seems to be inconsistent with the correct view of the relative position, for revenue purposes, of the company and the receiver of the dividend, for the rate of tax deducted from the dividend may bear no relation to the rate of tax paid by the company. But, even so, the power to deduct is quite unnecessary, for the company is still unable to distribute more than its net profits left after deduction of the tax that it has paid, and a deduction of tax from net profits will again merely affect the amount of net profits being distributed. Whenever a dividend is paid out of net profits, by which I mean profits that have been taxed, a grossing up will still be necessary for sur-tax and abatement purposes, whether the company does or does not purport to deduct tax. The section in question will merely affect the rate at which the grossing up is done.

But I must now turn to the Finance Act, 1931, s. 7 (1), which enables a company to deduct tax when distributing profits that have never been brought into charge to tax, as that phrase was interpreted in *A.-G.* v. *Metropolitan Water Board* (7). This was, therefore, an entirely new power conferred upon the companies, and its exercise may have an important effect upon its shareholders. Before the Act was passed, if a company distributed profits that had not been brought into charge, no grossing up took place, or ought to have taken place, even if the company purported to deduct tax. The deduction merely reduced the amount of the profits divided. But, since the Act, a distribution of untaxed profits, such as are mentioned in subsect. (1), must, if paid under deduction of tax, be grossed up for sur-tax purposes. If not paid under deduction of tax, they need not be grossed up. Such seems to be the effect of sect. 7 (2) as interpreted in *Neumann's* case (2).

The position therefore seems to me to be as follows: If a company distributes by way of dividend profits that have been brought into charge to tax, the dividend must be grossed up for sur-tax purposes, even though the company does not purport to deduct income tax. This is not (as has sometimes been thought to be the case) because, when there is no purported deduction of income tax, the company is giving the shareholder, in addition to the dividend, something extra, in the shape of a freedom from liability to tax, because the shareholder is never subject to any such liability. It is because the income tax on the profits has already been paid. *Inland Revenue Comrs.* v. *Pearson, Inland Revenue Comrs.* v. *Pratt* (5) was a case of this sort, and was, in my opinion, rightly decided, though I cannot agree with all the reasons given by Lawrence, J., for his decision. If, on the other hand, a company distributes by way of dividend profits and gains for a year that have not been charged to tax, but which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the company to assessment to tax for that year, if the computation had to be made by reference to such profits and gains, grossing up of the dividend for sur-tax purposes will, in my opinion, be necessary only in cases where the company has in fact made a deduction for tax. In such a case, grossing up is made obligatory by the Finance Act, 1931, s. 7 (2). But for that section, no grossing up could be required, for the dividend would be a share of profits that were not liable to be brought into charge, and could be properly distributed in full among the shareholders. The only question, therefore, to be determined in the present case is whether the dividend falls within sect. 7 (2), for we are invited by the Crown to treat the case as though no part of the profits of the company for the year ending Jan. 31, 1934, had been brought into tax. In my opinion, it does not. The company has made it quite clear that it has made no deduction for tax, it being expressly stated in the resolution for the dividend that it should be paid "without deduction of tax." The amount received by the appellant cannot therefore be regarded as being a net amount within the meaning of the subsection as interpreted in *Neumann's* case (2). For these reasons, I respectfully differ from FINLAY, J. He thought that there was no difference between the expression "without deduction of tax" and "tax free." In this I cannot agree with him. LORD WRIGHT pointed out in *Neumann's* case (2), at p. 373, that the phrase "tax free" indicates that the dividend is net, and under deduction of tax. It is therefore the precise opposite of "without deduction of tax."

It only remains to say a word or two about *Neumann's* case (2). The relative positions for income tax purposes of shareholders and their company being what they are there held to be, a real difficulty arises in a case such as that was, of a company having profits taxable under Sched. A. Take the case of such a company, having £10,000 profits derived from house property, of which the assessment value for Sched. A is £5,000. Income tax being at the rate of 5*s.* in the £, the company will pay £1,250 in tax, and can distribute £8,750 among its shareholders. If it does so without deduction, the shareholders plainly can be grossed up to £10,000, that being the sum that, under deduction of tax at 2*s.* 6*d.* in the £, will produce £8,750. If the company purports to pay under deduction of tax, as it has the power to do, the only effect will be that it will distribute a sum less than £8,750 by the amount of the tax deducted. Suppose that for some reason the company distributes less than the £8,750—say, £4,375. Ought this to be grossed up to £5,625 by the addition of the £1,250 tax, or ought it to be grossed up only at 2*s.* 6*d.* in the £ to £5,000? In the latter case, the other £4,375 will also be grossed up to £5,000 after it is distributed. In the former case, the second £4,375, after it is distributed, will not be liable to be grossed up at all. It will have to be treated as a sum that is not taxable at all. This was, I suspect, the position of the £4,275 in *Neumann's* case (2). It was the sum remaining in the company's hands after the profits to the amount of the Sched. A assessments had been distributed. The persons to whom those profits had been distributed would no doubt have been grossed up for sur-tax purposes at the full rate of current income tax, and not merely at the average rate of tax that the company was liable to pay in view of the *Salisbury House* decision (4). The £4,275 was therefore a sum which the shareholders were entitled to treat as a gross dividend, and so the House of Lords held. The company had not in fact made a deduction in that case. Had they done so, the sum paid after deduction would still have remained a gross sum. The company would merely have failed to distribute the whole £4,275. In my opinion, the appeal should be allowed.

MACKINNON, L.J.: This case presents perhaps the most difficult problem which I have ever attempted to solve. That difficulty results from three factors: (i) the extraordinary obscurity under the Income Tax Acts of the relative positions of a company and its shareholders as to the payment of income tax; (ii) the increase of that obscurity resulting from the introduction of super-tax or sur-tax; and (iii) the difficulty of ascertaining with certainty the effect of the case that is said to be most relevant—namely, the decision of the House of Lords in *Neumann's* case (2).

The most illuminating explanation of the historical origin of the first-mentioned obscurity I find in the utterance of LORD PHILLIMORE in *Bradbury* v. *English Sewing Cotton Co.* (6). It was read by LORD TOMLIN in *Neumann's* case (2), and I need not read it again. Although that may give the reason for the obscurity, it does not dissipate it, still less does it excuse it. In fact, a company is a *persona* distinct from its shareholders, and they are not even quasi-partners. In the attempt to grope their way through the region of make-believe thus created, various acute minds have been led into error. For instance, SWINFEN EADY, L.J., said, in *Brooke* v. *Inland Revenue Comrs.* (8), at p. 267:

> Where the duty is paid by a company in respect of the gains and profits of its business it pays the income tax as agent for its shareholders.

SCRUTTON, L.J., in the same case, said, at p. 270:

> I am quite clear that a company in paying income tax at the source at any rate pays as agent of the shareholders.

But VISCOUNT CAVE, in *Inland Revenue Comrs.* v. *Blott* (9), says, at p. 201:

> Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders.

As VISCOUNT CAVE was delivering his opinion in the House of Lords, I must take it that SWINFEN EADY and SCRUTTON, L.JJ., were wrong. Entertaining, as I do, a lively expectation that I may be held to be wrong in this or any other judgment about income tax, I comfort myself in anticipation by the thought that I err in such distinguished company.

Whatever may be the true analysis of the position and relation of the company and its shareholders as to income tax, it seems to be clear that, when the company has paid, or by a reserve has provided for, income tax on its profits, and has distributed its net balance after such payment, or reserve, to the shareholders, each shareholder is not liable to be assessed to tax on what he receives. His liability for tax at the standard rate has been discharged by what the company has done. But what the company has done has not discharged his liability for sur-tax, if his total income exceeds the sum that attracts sur-tax; nor has it imposed income tax upon him, if his total income is within the exemption from tax. In the former case, he must include a sum in respect of the dividend in his return for sur-tax. In the latter case, he can, by making the proper claim, recover the tax notionally paid by him through the action of the company.

In the present case, the commissioners appear to have decided in favour of Mr. Cull, on the ground that the description "without deduction of tax" has not the same meaning as "tax free." In the argument before us, great reliance was put upon the taste or skill of the directors in the choice of adjectival expressions. I cannot think that the liability of a shareholder for sur-tax can depend upon such qualities in the directors. It must depend upon the true nature of the sum of money received by the shareholder, and upon what the directors have done before they paid it to him. It cannot depend upon what they say to him when they pay it.

In the ordinary case, a company which has paid, or made provision for paying, income tax on its profits, and distributes some, or all, of the balance to its shareholders, does so by sending a cheque for £N to a shareholder, with an accompanying voucher: "Dividend £G, less income tax £T, net amount £N." The shareholder who is within the class privileged to pay sur-tax has to include £G in his return. The shareholder who is fortunate enough to have a very small income can claim to be paid £T by the authorities.

In the less ordinary case, a company which has paid, or made provision for paying, tax on its profits employs a different phraseology in distributing some, or all, of the balance among its shareholders. It does not say: "Dividend £G, less income tax £T, net amount £N." It states the dividend as "£N, free of income tax." But, of course, the variation from the other form is a mere matter of words, and not a matter of substance. If a company has issued "six per cent. preference shares free of income tax," it will, on a £100 holding, send out a warrant in the form, "Dividend £6 free of income tax," and attach a cheque for £6. If income tax were perpetually at 5*s.* in the £, these shares might just as well be called "eight per cent. preference shares," and the dividend warrant would then be in the form, "Dividend £8, less income tax £2, net amount £6." If it were in that more familiar form, the shareholder liable to sur-tax would have to include £8 (G) in his return. If it were in the form "£6 free of income tax" (N), the shareholder was at one time put to a little more trouble, because he had to go through the calculation required to result in the figure £8 (G). But, in obedience to the Finance Act, 1924, s. 33, the company now saves him that trouble, usually, I think, by printing on the back of its voucher the £G amount relative to the £N shown on its face as the sum paid "free of tax." In such a case, the matter becomes hardly even a matter of words, but merely a matter of the parts of the paper on which they appear. Instead of putting on the face "£G less £T, i.e., £N payable," it puts on the face "£N amount payable," and on the back "£G is the result if £T be added to £N."

Though all this is elementary, it seems to me to illustrate that, as a matter of substance, and not of phraseology, if a company which has paid, or has made provision for paying, tax on its profits distributes a dividend to its shareholders which is stated to be £N (that is the amount

for which the cheque is filled up), the result is the same whether the
dividend of £N is described as "free of tax," or "without deduction of
tax," or "actual," or by any other form of words, or with no words of
description being added at all. The substance of the matter is that the
shareholder is being paid a piece of income on which he is not liable to
be directly assessed to income tax. In the normal case, that is not because A
the sum in question is a sum which does not attract income tax, but because
his tax upon it is deemed in some way to have been paid by what
has been done by the company. If, therefore, the sum he receives, £N,
is a sum on which notionally he has paid £T as tax, he must add £T to £N,
and include the resulting £G in his sur-tax return. B

I say "in the normal case." *Gimson* v. *Inland Revenue Comrs.* (10) was
an abnormal case. The shareholder there received from the company
£X, which was called a dividend. But it was not a payment to the quasi-partner
of a share of profits of the quasi-partnership, on which income
tax had been paid, or would have to be paid, by the company. In the C
mysterious language of r. 20 of the General Rules, it was not any dividend
of the "profits or gains to be charged on any body of persons," and in
paying it "the body of persons" would not be "entitled to deduct the
tax appropriate thereto," for the money, of which £X was paid to Gimson
as his share or dividend, was a sum made up from two sources: (*a*) from D
capital moneys, and (*b*) from profits of the company that were not liable
to tax. Gimson was not liable to be directly assessed to tax on the £X
he received. But that immunity arose, not because tax upon it had been
notionally paid by what the company had done, but because it was
money on which neither the company nor the shareholder was, having E
regard to its nature, liable to pay tax, and, as sur-tax is payable only
upon items of income on which the subject has in fact, or notionally,
paid, or is liable to pay, income tax, Gimson was not called upon to include
the £X in his return for sur-tax, after grossing it up.

In the present case, the £21,000 received by Cull from the company F
clearly did not possess one aspect of the abnormality of the sum received
by Gimson in his case. Cull received a share, not of any capital sum, but
of the trading profits of the company. Can it be said, then, that what he
received was a share of profits of the company that were not liable to
income tax? G

The case finds that the company's net profits for the year ending
Mar. 31, 1934, were £559,374, and it was a part of these net profits that
brought Mr. Cull his £21,000. The case further finds that "owing to
previous losses the company was not liable to be charged to income tax
for the year ending Apr. 5, 1934," but that the balance of £559,374 was H
arrived at after putting to reserve £99,114 as:

> a reserve for income tax which would become chargeable in respect of the next financial year which would be assessed on the basis of the company's profits for the year to Mar. 31, 1934.

That means that, when the company paid Cull £21,000 as part of its net balance of trading profits of £559,374, it had not yet paid income tax on the £559,374. But it would in due time be liable to pay it. £99,114 had been set aside in order to pay it, and the net figure of £559,374 had been arrived at after making that reserve. In order that a shareholder may be immune from assessment to income tax on a dividend he receives, A by virtue of his tax having been notionally paid by what the company has done, it is not necessary that the company shall in fact have paid the tax before it pays him the dividend. It is obviously enough if the company is liable to pay it, and is going to pay it in due course. If I remember aright, this is reflected in the terms of the voucher attached to B every ordinary warrant, by which a secretary certifies that the tax will be paid to the proper officer, not that it has been paid.

There remains one further fact. The company paid Cull £21,000 on Mar. 31, 1934—that is, during the financial year ending Apr. 5, 1934. It was only liable to pay the income tax on the £559,374 in the financial C year ending Apr. 5, 1935. Does that make any difference ? Though strange things result from income tax legislation, it would be very strange if Cull should not be liable for sur-tax on £7,000 in respect of a payment to him on one day, but would be so liable in respect of the identical payment if it had been made a week later. I do not think that D it does make any difference, and I have at times had an idea that sect. 7 (1) of the Act of 1931 says that it shall not make any difference.

The case further states that the first contention on behalf of Mr. Cull was that the £21,000 :

> was not a "tax free" dividend, but a dividend of 21*s*. per share from which the E company was entitled but was not bound to deduct income tax.

If the company was so entitled, it must be because, in the language of r. 20, it was "a body of persons" paying a dividend out of "profits or gains charged [with income tax] before any dividend thereof is made." That must also mean that, if the directors had been so minded, they might F have declared this dividend in the form, "Dividend of 28*s*. per share, less 7*s*. income tax, net dividend 21*s*." In that case Mr. Cull clearly must have included the 28*s*. figure in his sur-tax return. Or it might have declared the dividend in the form, "Dividend 21*s*. free of tax." In that case again Mr. Cull must have put down the 28*s*. figure in his G sur-tax return. But it is said that, because they adopt the form, "Dividend 21*s*. without deduction of income tax," Mr. Cull need put down only the 21*s*. figure. The decision of the special commissioners accepted this, and seems therefore to have been based solely on this variation of language.

H As I said before, I think that it is impossible that a shareholder's liability for sur-tax can depend upon the form of words in which directors of a company choose to characterise the dividend they pay to him. His liability must depend upon the essential nature of the payment. Looked at in that way, this was a payment of a dividend by way of a share of the profits of the company, on which profits the company was at the proper time liable to pay income tax. By this time the company has no doubt in fact paid it. That being so, this dividend, when received by Mr. Cull, was not liable to assessment to tax in his hands, for it was in his hands income on which notionally he had paid tax, and a sum which notionally had by such payment been reduced from a larger sum. It follows, in my opinion, that he must include that larger sum in his sur-tax return.

It remains for me to consider whether this result is affected, or whether my opinion must be revised, by reason of the decision of the House of Lords in *Neumann* v. *Inland Revenue Comrs* (2), that being the case principally relied on by the appellant. That was, again, an abnormal case. The Salisbury House Estate, Ltd., put to reserve a sum of money to provide for additional income tax on their profits in case they should lose the suit, *Salisbury House Estate, Ltd.* v. *Fry* (4). Having won that suit, they distributed the whole sum so set aside among their shareholders. Neumann, who was one of them, received £4,275. This was first described in an accompanying letter as:

Gross amount of dividend	£5,343
Less tax at 4*s.* in the £	1,068
	£4,275

In a subsequent communication, however, the payment was described as a dividend of "5 per cent. actual," and the former account was amended to:

Gross amount of dividend	£4,275
Income tax appropriate	Nil
	£4,275

Neumann's case (2) ensued, upon the question as to whether he must include an item in respect of this dividend in his return for sur-tax, and, if so, whether that item must be £4,275 or £5,343. The House of Lords decided that an item in respect of this dividend must be included in his sur-tax return. I understand this to be on the ground that the company, by paying its income tax under Sched. A, had discharged Neumann's liability for income tax on his dividend. If, therefore, his dividend was income on which he had had, in fact or notionally, to pay income tax, it was income that was liable to sur-tax. If this be so, I confess I should personally have thought that what he received must be regarded as the net sum resulting from the notional deduction of tax from a larger amount, and that therefore he must put that larger amount into his sur-tax return. But their Lordships held that he need insert only £4,275, the sum he actually received, and not £5,343. The question is: What were the precise reasons for this part of their decision? And can those reasons avail the appellant in this case to establish that he need insert in his sur-tax return only the sum he received, £21,000, and not £28,000?

Of one thing I am quite sure. Their Lordships did not base their decision on the fact that the directors of the company had selected the adjective "actual," or had used any particular language, in order to characterise the dividend they paid. It is clear that all such verbal experiments by a board of directors must be immaterial.

The reasons for this part of the judgment, which was on the Crown's cross-appeal, are in a small compass. LORD TOMLIN dealt with it in one paragraph, and LORD WRIGHT on two pages. LORD WARRINGTON merely expressed his concurrence with LORD TOMLIN.

I am not sure that the reasoning of LORD TOMLIN and that of LORD WRIGHT are exactly the same. LORD TOMLIN appears to put it on the ground that the higher sum of £5,353 "not only never has come to [Neumann] but has never existed in fact." LORD WRIGHT, as his main reason, or in addition, lays emphasis on the word "net" in sect. 7 (2) of the Act of 1931, and says, at p. 243:

> What was distributed, being £4,275, was in my judgment the gross amount: the company, though authorised to deduct tax from it, were not bound to deduct it and did not in fact do so. I cannot see any justification for describing the sum distributed as a "net amount," and hence I conclude that sect. 7 (2), does not apply.

I think that LORD WRIGHT is here referring to the same fact as LORD TOMLIN referred to—namely, that, in the special circumstances of that case, the company had only £4,275 which they could distribute to Neumann. If they deducted tax at all, they could only have deducted it from £4,275, since that was all they had. They could not have deducted it from £5,353, since they had not got £5,353. Hence £4,275 could not be the "net" amount received, and Neumann could not be "deemed" to have received £5,353, since £5,353 never existed.

If that be the true basis of that decision, it depended on the very special facts of that case. But no such special facts exist in this case. The company here distributed £559,374, which included £21,000 to Mr. Cull. But £559,374 was not all they had got. They had in addition £99,114, which they had set aside to meet the tax on the £559,374. As regards the £7,000 sought to be added to Cull's £21,000 for the purposes of his sur-tax, that sum did not come to him, but it did exist in fact. It did not come to him because the company retained it, and in fact retained it as part of the reserve for income tax. That being so, I see no difficulty in describing the £21,000 as the "net amount" received by Cull, and in making sect. 7 (2) apply to it. In the result, I think that this appeal must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Freshfields, Leese & Munns* (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

BOULTON *v.* SUTHERLAND.

[Court of Appeal (Slesser and Scott, L.JJ., and Farwell, J.), **January 25, 26, 1938.**]

Landlord and Tenant—Rent restriction—Controlled dwelling-house—Order for recovery of possession—Apportionment of rent—Rent payable for sublet portion in excess of recoverable rent—Whether court ought to consider possibility of overcrowding—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *ss.* 3, 4—*Housing Act,* 1936 (*c.* 51), *s.* 58, *Sched. V.*

The plaintiff was the owner of a controlled dwelling-house which was let to the defendant at a weekly rent of 11*s.* 10½*d.* The defendant had sublet two rooms at a weekly rent of 7*s.*, the sublet part being also a controlled dwelling-house within the meaning of the Act. The judge apportioned the rent attributable to the sublet portion as $\frac{5}{11}$ of the whole rent. The rent of the sublet portion therefore exceeded the recoverable rent in respect of that portion by 1*s.* 7¼*d.* per week. The judge thereupon made an order for the recovery of possession of the sublet portion of the house. It was contended for the defendant that the judge ought to have considered the question of whether or not the order made would necessarily result in overcrowding, as the plaintiff had a wife and four sons, and the order for recovery of possession applied to the sublet portion only, and was sought for the purpose of the plaintiff and his family going into possession thereof :—

Held : once the fact of overcharging had been established, the judge was entitled to make an order for possession under sect. 4 (1), provided that he was of the opinion that it was reasonable so to do. The judge having stated that he had considered all the circumstances of the case, presumably including the question of the possibility of overcrowding, the Court of Appeal would not disturb his finding.

[**EDITORIAL NOTE.** The judgment herein removes a doubt upon the construction of sects. 3 and 4 of the Act of 1933. These sections are quite independent enactments, and the effect of sect. 4 is that once it is proved that a tenant has been overcharging his sub-tenant, the judge can make an order for possession. This is subject to the qualification that in all cases the judge must consider it reasonable in all the circumstances to make the order. Incidentally the case raises a question upon overcrowding. Where the person seeking possession for his own occupation has so large a family that they cannot be properly accommodated in the statutory dwelling-house to which the order will relate, it appears that the judge may presume that no offence under the Housing Act, 1936, will be committed, but that part of that family will be accommodated elsewhere.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 20, pp. 331, 332, paras. 394-397 ; and for Cases, see DIGEST, Vol. 31, pp. 576-582, Nos. 7256-7310.]

Case referred to :

(1) *Williamson* v. *Pallant*, [1924] 2 K. B. 173 ; 31 Digest 577, *7261* ; 93 L.J.K.B. 726; 131 L.T. 474.

Appeal by the defendant from the judgment of His Honour Judge Haydon, K.C., at the Croydon County Court, dated June 2, 1937.

T. F. Southall for the appellant.

S. K. de Ferrars for the respondent.

Southall : Before an order for recovery of possession can be made, the judge must be satisfied of two things : that it is reasonable to make such an order, and that a tenant has been overcharging his subtenant. There must be the same definition of "reasonable" in sect. 3 and in sect. 4. Anything said to be unreasonable in the schedule to sect. 3 must also be unreasonable under sect. 4. There was here no sufficient evidence of overcharging. It is submitted that any fact which has any bearing on the case ought to be considered by the judge. This house had only two rooms, and this man and his wife and four sons were going into it. Under the Housing Act, 1936, s. 58, and the Fifth Schedule, there would be overcrowding, and that is a circumstance that the judge ought to have considered. The plaintiff would be liable to a penalty of £5 per day under that Act. [Counsel referred to *Williamson* v. *Pallant* (1).]

de Ferrars was not called on.

SLESSER, L.J.: This appeal fails. This was a claim brought by a Mr. Boulton, who in Mar., 1936, purchased the house which is the subject-matter of a dispute in this case. He has a wife and four sons, aged 17, 15, 13, and 9 respectively. At the time when the action was brought, there was living in the house the defendant, a Miss Sutherland, as tenant of the house to the plaintiff, and she had sublet a part of her premises at 7*s.* a week to a Mrs. Poles. Mrs. Poles had the two front rooms and the use of the kitchen and the bathroom. The rest of the house was occupied by the defendant. Mrs. Poles, the sub-tenant, also had the use of the garden. In these circumstances, the plaintiff being in possession of another house, which he had sold, and, having purchased the present house, and seeking possession of the present house, he gave to Miss Sutherland a notice to quit. There is no question but that this house is a dwelling-house to which the Rent Restriction Acts apply, and the case raises a point of some interest with regard to the relations of sect. 3 and sect. 4 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Sect. 3 of that Act limits the conditions on which an order or judgment for recovery of possession of any dwelling-house to which the principal Acts apply, or the ejectment of a tenant therefrom, shall be made. It can be made only on certain conditions stated in sect. 3, which are of two classes: first, that:

> . . . the court considers it reasonable to make such an order or give such a judgment, and either (*a*) the court has power so to do under the provisions set out in the First Schedule to this Act; or (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

In the present case, there is no suggestion that on any view the power under (*b*) could here be exercised. There is no evidence that suitable alternative accommodation is available for Miss Sutherland. It is said, however, that the provisions of the First Schedule to the Act, which are set out at the end of the Act, though they do not apply to this case directly, yet, when we come to consider the section under which this particular case is brought, in some way assist in the interpretation of that section. That is why I mention sect. 3. Secondly, it is necessary to mention sect. 3 because sect. 4 of the Act, which is here directly in point, begins with the words "Notwithstanding anything in the last foregoing section." I read those words *prima facie* to mean that whatever there follows is to be construed irrespective of sect. 3 immediately preceding this section.

Sect. 4 (1) is to the following effect:

> Notwithstanding anything in the last foregoing section, an order or judgment for the recovery of possession of a dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom may be made or given where the court considers it reasonable so to do, if the court is satisfied that the rent charged after the passing of this Act by the tenant for any sublet part of the dwelling-house which is also a dwelling-house to which the principal Acts apply was in excess of the recoverable rent of that part.

In this case there is no question raised but that, by reason of the definition given in the Act, the part sublet to Mrs. Poles was also a dwelling-house within the meaning of the Act. No question there arises. Therefore, the question is: Was the court satisfied that a rent charged by the tenant for the sublet portion of the house—which was 7*s.* a week—in excess of the recoverable rent of that part? In so far as the whole house had been let to Miss Sutherland, it was not possible, in the first place, to say what the rent of that sublet part would be as paid and attributable to the landlord—paid by the tenant for that particular part. The legislature has contemplated that difficulty, because in sect. 4 (2) it says:

> Where, in any proceedings under the last foregoing subsection for the recovery of possession of a dwelling-house or for the ejectment of a tenant therefrom, it appears to the court that neither an apportionment of standard rent as between the dwelling-house and the sublet part thereof nor a determination of the recoverable rent of the sublet part has previously been made by the county court, the court shall make such an apportionment or determination, whether or not an order or judgment is made or given for the recovery of possession or the ejectment of the tenant.

There having been in this case no apportionment of standard rent as between the dwelling-house and the sublet part thereof, the county court judge duly made an apportionment, and apportioned the rent attributable to the sublet portion of the premises as $\frac{5}{11}$ of the whole rent, 11*s.* 10½*d.* The result of that is that there is an excess rent charged to Mrs. Poles, in respect of the part sublet to her, of, I think, 1*s.* 7¼*d.* The exact sum does not matter. The fact is that the judge has, after his apportionment, decided that the rent charged by the tenant for the sublet part was in excess of the recoverable part of the rent. Having come to that conclusion, in my opinion he was entitled to bring into operation sect. 4 (1), subject to the condition that the court considered it reasonable so to do.

I do not think that the note which appears in THE RENT AND MORTGAGE INTEREST RESTRICTIONS, 16th Edn., by the editors of the LAW NOTES, immediately following subsect. (1), is correct. This note says at p. 170:

> The effect of this subsection is to add a further case to those contained in the First Schedule to this Act of 1933 . . .

That is to say, to add to the many cases there set out, where under sect. 3 an order may be made, one more illustration.

In my view, sect. 4 is quite general in its terms. It says, "Notwithstanding anything in the last foregoing section," and that eliminates not only sect. 3, but also the First Schedule in so far as it is required by A sect. 3 to be read into sect. 3.

The result is that, once the condition is satisfied that the rent that was payable in respect of the sublet part was in excess of the recoverable rent of that part, the judge has the power, irrespective of any other section, to make an order for the recovery of possession of the dwelling-B house, if he considers it reasonable so to do. On that, the judge tells us in his judgment:

> Having considered all the circumstances, I think that the order which I made was reasonable.

C It is argued for the appellant here that it was not competent for him to come to that conclusion, that he had excluded from his consideration certain facts which he ought to have considered, and that, had he considered them, it might have been that he would have come to a conclusion that the order which he made was not reasonable. The ground D on which it is said he might have come to that conclusion is that, if that order were made, in so far as it was an order for possession of the sublet portion only of the dwelling-house then occupied by Mrs. Poles, leaving Miss Sutherland in possession of her part of the house, it would really mean putting this large family of the claimant—his wife and four children E varying in age from 17 to 9—in a dwelling-house consisting of only two rooms, and that that would of necessity constitute an offence under the Housing Act, 1936, and more particularly under the Fifth Schedule.

It appears that the solicitor appearing for the defendant called the atten-F tion of the judge to the Housing Acts. He used the expression that, though it might have to be considered elsewhere—by which I suppose he meant in some court of criminal jurisdiction—it did not immediately concern the court. Also, when we come to look at the evidence, there is no evidence, I think—at any rate, no evidence that the judge was bound to consider—G that these sons would necessarily all remain in these rooms, more particularly after it had been pointed out to the judge that their joint occupation might constitute an offence under the Housing Act. In any case, it appears to me to be merely a matter of speculation, and, the judge having told us that he had considered all the circumstances of the case, I think H that it would be quite unreasonable for us here, sitting as a Court of Appeal, to say that he had in any way erred in law because he had not considered a matter which he was told was not a matter which concerned the court.

For these reasons, I think that he was fully entitled to come to the conclusion that it was reasonable that he should make the order, and, as the conditions of sect. 4 of the 1933 Act were fully satisfied, no complaint can be made of his order, and this appeal must be dismissed.

SCOTT, L.J.: I agree.

FARWELL, J.: I agree. A

Appeal dismissed. Operation of order stayed for a month, on the defendant's undertaking to pay the current rent.

Solicitors: *Harry Chandler* (for the appellant); *Frederick Gowen*, Croydon (for the respondent.)

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*] B

LIVERPOOL CORPORATION *v.* HOPE.

[COURT OF APPEAL (Slesser, Scott and Clauson, L.JJ.), **February 3, 1938.]** C

Rates and Rating—Arrears of rates—Whether action lies—Remedy by distress. Landlord and Tenant—Mortgage—Interest in arrear—Appointment of receiver—Whether receiver under any statutory duty to rating authority to pay rates—Law of Property Act, 1925 (*c.* 20), *s.* 109 (8).

The defendant was the receiver of the rents of certain premises, having been appointed by the mortgagees. The plaintiff corporation brought this action to recover rates in respect of a period prior to the time when the defendant was appointed. It was contended that the Law of Property Act, 1925, s. 109 (8), placed the defendant under a statutory duty to pay the rates:— D

HELD: (i) no action lies to recover rates. The only remedy is that of distress given by statute. E

(ii) the defendant was not under any statutory duty to the plaintiffs, but only to the mortgagor.

[EDITORIAL NOTE. It has been generally assumed that the only remedy available in respect of rates is that of distress given by the statute, and that no action for rates will lie. It seems doubtful whether this has ever been expressly decided before the present appeal. Here an attempt was also made to spell out from the provisions of the Law of Property Act, 1925, dealing with the application of moneys collected by a receiver appointed under a mortgage deed, a statutory duty to pay rates to the rating authority. It is held, however, that, if there is any statutory duty arising out of those provisions, it is not one that is owed to the rating authority, nor one which gives them any right of action against the receiver. F G

AS TO RECOVERY OF RATES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 525, 526, paras. 974, 975; and FOR CASES, see DIGEST, Vol. 38, pp. 627-633, Nos. 1465-1521.]

Cases referred to:

(1) *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q.B. 402; 34 Digest 218, *1815*; 67 L.J.Q.B. 862; 79 L.T. 284. H

(2) *Re Marriage, Neave & Co., North of England Trustee, Debenture & Assets Corpn.* v. *Marriage, Neave & Co.*, [1896] 2 Ch. 663; 18 Digest 398, *1387*; 65 L.J.Ch. 839; 75 L.T. 169.

(3) *Pigg* v. *Tow Law Overseers* (*Weardale Union*) (1923), 22 L.G.R. 17; 38 Digest 626, *1460*.

Appeal from a decision of His Honour Judge Dowdall at the Liverpool County Court dated Sept. 29, 1937.

J. Charlesworth for the appellant.

F. A. Sellers, K.C., and *Selwyn Lloyd* for the respondents.

Charlesworth : No such action lies. The only remedy under the Poor Relief Act, 1601, is distress and the sale of the defendant's goods. There is nothing in the Rating Acts which imposes a personal liability on an owner or an occupier. [Counsel referred to Poor Relief Act, 1814; Distress for Rates Act, 1849; Poor Rate Assessment and Collection Act, 1869; Rating and Valuation Act, 1925; and *Re Marriage, Neave & Co., North of England Trustee, Debenture & Assets Corpn.* v. *Marriage, Neave & Co.* (2).] A receiver is not liable for rates due in respect of a period before he was appointed. His duty is only to pay such rates as he is liable for; he is not on the rate-book: see *Pigg* v. *Tow Law Overseers* (*Weardale Union*) (3). A receiver is under no statutory duty as against the rating authority, but only as against a mortgagor. [He was stopped by the court.]

Sellers, K.C. : The mortgagor had collected the rents, and the rates were included in them by the tenants. Subsequently the receiver was appointed. Action for rates lies as against an owner or an occupier; distress is an additional remedy.

Slesser, L.J. : This appeal succeeds. This is a claim by the Lord Mayor, aldermen and citizens of the city of Liverpool against Norman Hope, an estate agent, who was at one time the receiver of the rents of certain premises which were owned by one Hodson. The premises are such that the rates are paid by what is called "compounding." That is to say, as is usual and frequent with small properties, the landlord has agreed with the corporation to pay rates which otherwise might have fallen upon the tenant. There is no question but that these rates fell into arrear, and on Oct. 12, 1936, an order for payment was made on Hodson by the magistrates. We read in the judgment of the county court judge that, as he expected to pay by Dec., 1936, no further immediate action was taken. But Hodson was not only in arrear with his rates, he was also in arrear with his mortgage interest to his mortgagees, a building society called the Universal Permanent Building Society. On Nov. 7, 1936, the building society appointed the defendant, Norman Hope, as receiver. Since that date he has paid the rates maturing. This is an action for the rates in arrear down to the date when he was appointed receiver. It appears that, since he has been appointed receiver, he has in fact collected from tenants a sum of more than £60 5*s.* 8*d.*, in addition to the rates maturing since then—a fact which seems to me irrelevant. The county court judge had to consider the claim as formulated, but, at the request of the counsel appearing for the plaintiffs, he allowed an amendment of that claim. The amendment does not appear to have been reduced into writing, but the effect of it was that the plaintiffs would rely, alternatively, upon damages flowing from a breach of statute. The county court judge in his judgment thinks that on both grounds the action would lie. In my opinion, on neither ground can this action be supported.

As to the first ground, which appears on the face of it to be an ordinary common law claim for debt, it is clear, to my mind, that the only remedy which is afforded to a local authority entitled to rates is the remedy of distress. A rate is not a common law liability. It is the creature of statute. Although it may not now be necessary for many purposes to travel behind the Rating and Valuation Act, 1925, for this purpose I think that it is necessary to go back to the Poor Relief Act, 1601, which provides for money being raised for the relief of the impotent poor and the like, and which, by sect. 2, provides that justices may make rates in aid of parishes, and that, in the event of rates not being paid, the overseers may levy rates and arrears by distress. It goes on :

> It shall be lawful as well for the present as subsequent churchwardens and overseers or any of them, by warrant from any two such justices of peace as is aforesaid, to levy as well the said sums of money, and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, as the sums of money or stock which shall be behind upon any accompt to be made as aforesaid, rendering to the parties the overplus.

That is the only remedy which is afforded by that statute. Since that time, numerous statutes have been passed dealing with rating, which I think it is unnecessary here to consider. It is sufficient to say that it is really not suggested, and it could not be suggested, that any statute, from the year 1601 to the Rating and Valuation Act, 1925, or any Act amending that Act, has ever provided the local authority with any remedy for the non-payment of rates other than the remedy of distress. In those circumstances, the county court judge does not, as I understand it, suggest that there is any remedy at common law by action for the non-payment of rates, but he does suggest that an analogy should be drawn between a rating authority demanding rates and a landlord demanding rent. This is the passage which seems to me to form the basis of his judgment and to be lucidly wrong :

> But the rating authority has statutory authority to "raise" the rates from the ratepayer, and, though distraint is the usual procedure, that does not necessarily take away the right of action, any more than a landlord's power to distrain for rent takes away his right to sue for it.

It is elementary that the right of a landlord to sue for his rent arises either out of some express covenant or contract or out of the common law right he has arising from the relation of landlord and tenant. There is no such relationship, there is no such contract, as between the local authority and the ratepayer, and the whole analogy is completely false. So much for the first claim as formulated.

The second method of formulation seems to be equally fallacious. It is said that there is here a breach of statute. It has been decided in many authorities, of which the case of *Groves* v. *Wimborne* (*Lord*) (1) is perhaps the leading one, that, in appropriate cases, where a person does suffer damage by reason of breach of a statutory duty by another, he may recover those damages in an action; but this principle is wholly inapplicable to the present case, for the very good reason that there is on Hope, the receiver here, no statutory duty the breach of which could, in any conceivable circumstances, give a right to damages to the local authority, the Liverpool Corporation. The alleged statutory duty which it is said he has failed to perform is contained in the Law of Property Act, 1925, s. 109 (8), which says:

> Subject to the provisions of this Act as to the application of insurance money the receiver shall apply all money received by him as follows, namely (i) in discharge of all . . . rates . . . affecting the mortgaged property.

That is no more than an obligation to be read into the mortgage deed. It is, as sect. 101 indicates, part of the powers incident to the estate or interest of the mortgagee, and for the sake of clarity is there stated rather than being fully written out in the mortgage deed as between the parties to the mortgage. It follows, therefore, that there is no semblance of a statutory duty to the corporation, no breach of that statutory duty, and no damages flowing from it.

On both grounds, therefore, as I have indicated, in my opinion the county court judge was wrong. He tells us in his judgment that a similar decision has been reached in the same county court upon a previous occasion. That comity of jurisdiction must, I think, cease. Whether it is this judge or some other judge who has exercised his powers upon that view, in both cases—this case, and, if a similar view has been entertained in the past, the other case—the view is wholly erroneous. It follows, as I say, that this appeal must be allowed with costs.

SCOTT, L.J.: I agree, and have nothing to add.

CLAUSON, L.J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *King, Wigg & Brightman*, agents for *Clayton & Gibson*, Newcastle-upon-Tyne (for the appellant); *F. Venn & Co.*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re RUTHERFORD'S CONVEYANCE, GOADBY *v.* BARTLETT.

[CHANCERY DIVISION (Simonds, J.), **January 18, 19, February 2, 1938.**]

Sale of Land—Restrictive covenants—Restrictions referred to in habendum but no covenant taken—Subsequent conveyance without reference to covenants.

In 1920, R. entered into an agreement with D. for the sale of certain property to him, and this agreement contained no reference to any restrictive covenants. No conveyance was made of the property until 1925, when the property was conveyed in two parts as follows. On July 24, 1925, D. and the plaintiff entered into an agreement for the sale of part of the above property, which was to be subject to certain restrictions mentioned in the schedule thereto. On Nov. 27, 1925, this agreement was carried into effect by a conveyance the habendum of which included the words "subject nevertheless to the restrictions and stipulations set out in the schedule thereto." These restrictions were the same as those in the agreement of July 24, 1925. The conveying party was R., who did not purport to convey by the direction of D., and neither the grantee nor D. entered into any covenant as to restrictions upon the property. Also on Nov. 27, 1925, R. conveyed the remainder of the property to D. in a conveyance not referring in any way to restrictive covenants. In 1927, D. conveyed the greater part of the property included in the second conveyance to B. "together with the benefit of the covenants, restrictions and stipulations contained in or imposed by" the conveyance to the plaintiff of Nov. 27, 1925. In 1935, B. similarly conveyed the same property to the defendant. On Nov. 11, 1937, the personal representative of R. assigned to the defendant the full benefit of the restrictions mentioned in the agreement of July 24, 1925, and in the first conveyance of Nov. 27, 1925, so far as the same were then capable of being assigned. Before that time, R. had parted with all the property for the benefit of which the restrictions were imposed :—

Held : (i) the assignment by the personal representative of R. was ineffective, as he then had nothing which he could effectively assign.

(ii) the first conveyance of Nov. 27, 1925, did not impose any contractual obligations upon the plaintiff, and, if it did, it did not impose upon him a contractual obligation to D., the benefit of which D. could assign.

[**EDITORIAL NOTE.** This case considers the effect of a deed which conveys land stated in the habendum to be subject to restrictions but contains no covenant to observe them. The effect of such a deed is stated to be that the land becomes subject to an equitable burden which cannot be regarded as a covenant in law, but the facts of this case made it unnecessary for this point to be finally determined here.

As to Restrictive Covenants, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 454-458, paras. 827-832 ; and for Cases, see DIGEST, Vol. 40, pp. 310-314, Nos. 2648-2675.]

Cases referred to :

(1) *Formby* v. *Barker*, [1903] 2 Ch. 539 ; 40 Digest 306, *2626* ; 72 L.J.Ch. 716 ; 89 L.T. 249.

(2) *London & South Western Ry. Co.* v. *Gomm* (1882), 20 Ch. D. 562 ; 40 Digest 305, *2617* ; 51 L.J.Ch. 530 ; 46 L.T. 449.

(3) *Spencer's Case* (1583), 5 Co. Rep. 16*a* ; 31 Digest 144, *2798*.

(4) *Re Union of London & Smith's Bank, Ltd.'s, Conveyance, Miles* v. *Easter*, [1933] Ch. 611 ; Digest Supp. ; 102 L.J.Ch. 241 ; 149 L.T. 82.

(5) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 ; 40 Digest 312, *2664* ; 69 L.J.Ch. 652 ; 83 L.T. 186.

(6) *Drake* v. *Gray*, [1936] Ch. 451 ; [1936] 1 All E.R. 363 ; Digest Supp. ; 105 L.J.Ch. 233 ; 155 L.T. 145.

(7) *Chambers* v. *Randall*, [1923] 1 Ch. 149 ; 40 Digest 303, *2605* ; 92 L.J.Ch. 227 ; 128 L.T. 507.

(8) *Re Ballard's Conveyance*, [1937] Ch. 473 ; [1937] 2 All E.R. 691 ; Digest Supp. ; 106 L.J.Ch. 273 ; 157 L.T. 281.

(9) *Zetland (Marquess)* v. *Driver*, [1937] Ch. 651 ; [1937] 3 All E.R. 795 ; Digest Supp. ; 106 L.J.Ch. 379 ; 157 L.T. 447.

(10) *Tulk* v. *Moxhay* (1848), 2 Ph. 774 ; 40 Digest 313, *2667* ; 18 L.J.Ch. 83 ; 13 L.T.O.S. 21.

(11) *Hodson* v. *Coppard* (1860), 29 Beav. 4 ; 40 Digest 322, *2725* ; *sub nom. Hodgson* v. *Coppard*, 30 L.J.Ch. 20.

(12) *Carter* v. *Williams* (1870), L.R. 9 Eq. 678; 40 Digest 324, *2736*; 39 L.J.Ch. 560; 23 L.T. 183.

(13) *Renals* v. *Cowlishaw* (1879), 11 Ch. D. 866; 40 Digest 316, *2686*; 48 L.J.Ch. 830; 41 L.T. 116.

(14) *Northbourne (Lord)* v. *Johnston & Son*, [1922] 2 Ch. 309; 40 Digest 321, *2722*; 92 L.J.Ch. 12; 128 L.T. 496.

Adjourned Summons, asking for a declaration that the land comprised in a conveyance dated Nov. 27, 1925, made between Sir William Watson Rutherford of the first part, Capt. Birt Davies of the second part, and Sir Kenneth Goadby of the third part, was not subject to any of the restrictions contained in the schedule thereto.

Lionel L. Cohen, K.C., and *C. L. Fawell* for the plaintiff.

H. A. H. Christie, K.C., and *J. A. Reid* for the defendant.

Cohen, K.C.: If the covenant can be implied, it cannot be a covenant which runs with the land at law, and the defendant cannot be in a position to enforce that covenant unless the covenant was made with him at the time for the benefit of the land retained. It cannot be assigned by the original covenantee after he has parted with all the land he originally possessed. The covenant which can be implied can be in favour of the vendor only. The land for which the benefit of the restriction was imposed was never clearly defined. Before a covenant can run with the land at law, certain conditions must be satisfied. One of them is that the land to which the covenants are attached must be certain and ascertainable. Secondly, it must be possible to tell from the documents that there was an intention to attach the covenant. In the present case, there was no covenant at law at all. There is no express covenant, and there can be no covenant, express or implied, at law where the party said to be liable has not executed the document. [Counsel referred to *Rogers* v. *Hosegood* (5), *Drake* v. *Gray* (6), *Formby* v. *Barker* (1), *Re Union of London & Smith's Bank, Ltd.'s, Conveyance, Miles* v. *Easter* (4), *Chambers* v. *Randall* (7), *Re Ballard's Conveyance* (8), *Zetland* v. *Driver* (9).]

Fawell: Assuming that the owner has property which for some reason or other is subject to a restrictive covenant, he is perhaps not interested as to whether there is a restrictive covenant or not. But if he wishes to sell the property he must sell subject to that restriction. The proper way of doing so would be to convey subject to the restriction. The parties here thought that there was a covenant, and they have conveyed subject to it, but they seem to have been mistaken. There is no ground for saying that there is an implied covenant. There is no necessary compulsion upon the court to imply a covenant.

Christie, K.C.: There is no magic in the existence of a covenant, but, if there is a covenant, it is for the court to construe it, and the court can deduce whether it runs with the land or not. I am not obliged to ask the court to imply a covenant. It is sufficient to ask the court to imply a contractual obligation or something binding. The intention of the parties is the real point, and that can be obtained from the conveyance itself, and from a consideration of all the circumstances. For the purpose of construing the document, the court is entitled to take into consideration the circumstances and to look at any document recited in the conveyance itself. Any objectionable building on one end of the land would affect the whole of the land. This is not a case like *Ballard's* case (8), where it was held that the covenant did not touch or concern the whole of the land. In the present case, the property is comparatively small, and the whole of it must be affected by any breach. It is not suggested that these covenants do not touch and concern the whole of the land granted to Captain Davies. The benefit of the stipulation is capable of being annexed to the land. [Counsel referred to *Tulk* v. *Moxhay* (10), *Hodson* v. *Coppard* (11), *Carter* v. *Williams* (12), *Rogers* v. *Hosegood* (5), and *Re Union of London & Smith's Bank, Ltd.'s, Conveyance, Miles* v. *Easter* (4).]

Reid: What one has to consider in these cases is how the burden of a restrictive covenant devolves and how the benefit of a restrictive covenant devolves. The burden devolves upon the rule in *Tulk* v. *Moxhay* (10). So far as the benefit of a restrictive covenant devolves, it may do so in either of two ways. The benefit may be annexed to the quasi-tenement so as to devolve with it without any express words. That is the case where there is a true equitable easement, and it is in those cases where the benefit of the covenant is said to run with the land at law. In those cases, one finds the curious position that the benefit of the covenant runs with the land at law and the burden runs in equity. In the present case, Sir Kenneth Goadby, the original covenantor, is still there. It is submitted that there is a covenant in the present case. The conveyance to Sir William Watson Rutherford is said to be subject to restrictive covenants, but no covenant has been entered into to observe them. Any provision to observe restrictive covenants can apply only so far as restrictive covenants exist. They exist because there is between the parties a collateral agreement by which these covenants have been imposed. There is no difficulty about the restrictions being imposed by a collateral agreement. The benefit of the covenant was expressly taken by Captain Davies, and it was assigned by him to Mr. Beazley. They were expressly assigned by Mr. Beazley to Mr. Bartlett. The conveyance itself, in effect, amounts to a covenant. [Counsel referred to *Rogers* v. *Hosegood* (5), *Formby* v. *Barker* (1), *Renals* v. *Cowlishaw* (13), and *Northbourne (Lord)* v. *Johnston & Son* (14).]

Simonds, J.: These proceedings are taken under the Law of Property Act, 1925, s. 84, the plaintiff, Sir Kenneth Goadby, claiming against the defendant, Fred Bartlett, a declaration that the land comprised in a certain conveyance of Nov. 27, 1925, is not subject to any of the restrictions contained in the schedule thereto.

The facts are not in dispute. In 1920, Sir William Watson Rutherford was the owner of certain property at Walton-on-the-Hill in the county of Surrey. The great bulk of it was copyhold of the manor of Walton-upon-the-Hill, but two small parcels of it were freehold. The property, or at least the house upon it, was known as Boxdale. In the same year, he entered into an agreement, dated Apr. 29, 1920, with one Birt Davies for the sale to him of the whole property for £9,000, of which £900 was paid as a deposit on the signing of the agreement, £2,100 was to be paid on June 25, 1920, when possession of the premises was to be given to Birt Davies, and the balance of £6,000 was to be paid on June 30, 1925. The agreement made no provision for the purchaser entering into any restrictive covenants. The £2,100 was, on or before June 25, 1920, duly paid to Rutherford, but the balance of £6,000 was not paid on June 30, 1925.

On July 24, 1925, Birt Davies and the plaintiff entered into an agreement for the sale and purchase for the sum of £2,000 of a parcel of copyhold land (being part of the land comprised in the sale from Rutherford to Davies) described as "all that piece of copyhold land situate and adjoining Boxdale within Walton-on-the-Hill in the county of Surrey." The sale was:

> for an estate of inheritance in customary freehold according to the custom of the manor of Walton-on-the-Hill, in possession free from incumbrances other than and except the restrictive covenants mentioned in the schedule hereto as affecting the same.

The agreement further provided that, of the restrictions contained in the schedule, Nos. 3, 5, 6, 7, 8 and 9 should apply to the whole Boxdale Estate, and that the vendor—that is, Davies—should enter into a covenant with the purchaser—that is, the plaintiff—to observe and perform the same, and to include them or similar covenants in any conveyance of other parts of the Boxdale Estate to any other purchaser or purchasers. The schedule contained a number of provisions, for the most part restrictive in character, though the first provision could not accurately be so described. The tenth provision was that the vendor (Davies) reserved the right of allowing a departure from the foregoing stipulations in any one or more cases.

On Nov. 27, 1925, the agreement between Davies and the plaintiff was carried out by a conveyance, which contains some curious features. The parties to it were Rutherford (therein called the vendor) of the first part, Birt Davies of the second part, and the plaintiff (therein called the purchaser) of the third part. It recites the vendor's title, the agreement between the vendor and Birt Davies of Apr. 29, 1920, the payment of the two sums of £900 and £2,100, the agreement between Birt Davies and the plaintiff of July 24, 1925, a subsequent agreement between the parties that the vendor should enfranchise the copyhold property and the consequent enfranchisement, and then witnesses that, in pursuance of the said agreements, and matters thereinbefore recited, and in consideration of the sum of £2,000 paid by the plaintiff to the vendor at the request of Birt Davies, the vendor as beneficial owner granted to the plaintiff the piece of land therein described, being the land comprised in the agreement of July 24, 1925, but then enfranchised to hold unto and to the use of the plaintiff in fee simple, subject nevertheless to the restrictions and stipulations set out in the schedule thereto. The restrictions and stipulations were, so far as I have checked them, verbatim the same as those contained in the agreement of July 24, 1925. It is to be observed: (*a*) that the vendor alone conveyed, and that he did not purport to convey by the direction of Birt Davies; (*b*) that the plaintiff, as grantee, did not enter into any covenant with anyone, nor in fact did he execute the deed; (*c*) that Birt Davies did not enter into any such covenant as was contemplated by the agreement of July 24, 1925.

On the same Nov. 27, 1925, by another conveyance executed later in the day, with other recitals similar to those in the earlier conveyance, and a recital also of that conveyance, Rutherford as vendor conveyed to Birt Davies in fee simple the remainder of the land comprised in the agreement of Apr. 29, 1920. This conveyance made no reference to any restrictive covenants.

The rest of the history can be shortly told. On July 20, 1927, Birt Davies conveyed to one George Arthur Beazley the greater part, including the residence, but not the whole of the land comprised in the second conveyance of Nov. 27, 1925. The parcels included these words:

> together with the benefit of the covenants, restrictions and stipulations contained in or imposed by the deeds specified in Part I of the schedule hereto.

The first deed in the schedule was the conveyance to the plaintiff of Nov. 27, 1925. On Nov. 30, 1935, Beazley conveyed the same property to the defendant Bartlett, the parcels containing the same words that I have already cited. On Nov. 11, 1937, Sir John Hugo Rutherford, the legal personal representative of the vendor Rutherford, who had died on Dec. 3, 1927, assigned to the defendant:

> the full benefit of all restrictive covenants, restrictions and stipulations mentioned in the agreement for resale (that is the agreement of July 24, 1925] and the first conveyance of 1925 as to be imposed upon or as affecting the plaintiff conveyed by the first conveyance of 1925 or to which the plaintiff is expressed to be subject and the fee simple of all obligations and covenants on the part of the said Sir Kenneth Goadby to or with the late baronet contained in or to be implied or gathered from the first conveyance of 1925, so far as the same are now capable of being assigned.

This last assignment was obtained by the defendant after these proceedings were commenced, but I must take it into consideration in determining whether the plaintiff is entitled to the relief which he seeks.

The facts, as I have stated them, give rise to a number of questions which are not easy to solve. I have to determine (i) what was the obligation, if any, to which the plaintiff became subject by virtue of the conveyance of Nov. 27, 1925, and his taking possession under that deed of the land thereby assured? (ii) was the benefit of the obligation, if any, either (*a*) annexed to the remainder of the Boxdale property and passed without express assignment to the purchaser thereof, or of any part of it, or (*b*) assignable by Birt Davies and assigned by him to

Beazley and by the latter to the defendant, or (*c*) assignable by Rutherford, the vendor, or his legal personal representative, at the time when the latter purported to assign it ?

Upon the first question, the defendant contends that from the words of the habendum I must imply some contractual obligation on the part of the grantee. He urges that, if the grant is to the grantee to hold, subject to the restrictions and stipulations contained in the schedule, and if he takes possession under that grant, it is as if he had agreed with the grantor to observe those restrictions and stipulations. He can, it is conceded, be under no liability at law, for he did not execute the deed, but so also, even though there were express covenants, he would not be liable at law if he did not execute the deed, yet in equity he would be bound by them : see *Formby* v. *Barker* (1), at pp. 547, 549, 555. For his main proposition, no relevant authority has been cited to me. It may well be that as between grantor and grantee in such a case the latter is bound in equity to observe the restrictions subject to which the former has granted the property to him. But it by no means follows that this equity can be stated in terms of contractual obligation so as to enable the grantor to assign the benefit of it to a successor in title. It is, in my judgment, at the most an equitable burden which cannot be forced into the legal category of covenant, just as the burden of a negative covenant, as expounded in *London & South Western Ry. Co.* v. *Gomm* (2), is an equitable burden which may be considered as arising from an extension in equity of the doctrine in *Spencer's Case* (3) or of the doctrine of negative easements, but does not, as between the covenantee and a purchaser of the covenantor's estate, rest on a contractual basis.

In the present case the difficulty of stating the equity in terms of contractual obligation is the greater, because I cannot state with certainty and clearness what was the contract and with whom it was made. It is clear at least that I cannot imply a covenant so framed that it will enure for the benefit of the land retained by the vendor Rutherford so as to pass to a purchaser of that land, or any part of it, without express assignment. It would be the merest speculation, and I have no firm ground upon which I should be justified in reading into the conveyance words of covenant apt to annex the benefit of it to the land unsold, or any part of it. With whom, then, am I to imply a covenant or agreement, and in what capacity ? With Rutherford or with Birt Davies, or with both of them, and the assigns of both of them ? Or is the contract with Rutherford to be effective only if he does not convey the rest of the land to Davies, and with Davies to be effective only if he does ? I am left in a maze of conjecture, in which it does not help me to find, upon looking at the stipulations themselves, that they appear to be taken sometimes for the benefit of " the owner or owners for the time being of the land immediately adjoining " sometimes for that of " the owner or owners of any adjoining property " and sometimes for that of " the owner for the time being of Boxdale," while the right of allowing a departure from the stipulations is reserved to the vendor, who is presumably Rutherford, though Davies may have been intended.

Counsel for the defendant was, I think, inclined to agree, in the first place, that it was with Davies and his assigns that the plaintiff entered into a contractual obligation by the conveyance of Nov. 27, 1925, and, only if that failed, to argue that it was with the vendor Rutherford and his assigns that the plaintiff contracted. To this he may have been driven by doubts as to the value of the assignment from Rutherford's legal personal representative of Nov. 11, 1937. But, if he entertained such doubts, he was, in my judgment, well justified. For, by Nov. 11, 1937, Rutherford had long since parted with all property for the benefit of which, upon any hypothesis, the stipulations were taken, and had parted with it without any reference to those stipulations. Upon the authority of *Re Union of London & Smith's Bank, Ltd.'s, Conveyance, Miles* v. *Easter* (4), where the earlier cases are examined, it seems clear that on Nov. 11, 1937, Rutherford's legal personal representative had nothing which he could effectively assign, and that the purported assignment of that date was of no effect. If, then, the restrictions in the schedule to the deed of Nov. 27, 1925, are enforceable by the defendant, it can be only upon the footing of an original agreement between the plaintiff and Davies, and on effective assignment of the benefit of it by the latter to Beazley, and by Beazley to the defendant. It was contended that I ought to infer such an agreement between the plaintiff and Davies, arising out of the conveyance, because it recited the agreement of July 24, 1925, in which the restrictions were first contained, and that agreement was between the plaintiff and Davies, and the vendor Rutherford had no part in it. But, assuming that for this purpose I am entitled to look at the agreement of July 24, 1925, I find in it provisions for covenants being entered into both by the plaintiff and by Davies, and then, turning to the conveyance of Nov. 27, 1925, I find in it covenants neither by the plaintiff with Davies nor by Davies with the plaintiff. I cannot assume that the covenant which I am invited to read into this document was with Davies rather than with the vendor, who still retained the remainder of the land, and would alone benefit by such a covenant if Davies did not complete his purchase.

In these circumstances, I cannot safely infer a contract with Davies, the benefit of which he could assign, and it is unnecessary for me to consider the further question as to whether he could assign it upon a sale of part only of the land for the benefit of which it must be assumed to have been given. In the result, I hold that the conveyance of Nov. 27, 1925, did not impose any contractual obligation upon the plaintiff, and, further, that, if it did, it did not impose upon him a contractual obligation to Davies, the benefit of which the latter could assign.

Solicitors: *White & Leonard & Nicholls & Co.* (for the plaintiff); *Stanley & Co.* (for the defendant.)

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

C. BRYANT & SON, LTD. *v.* BIRMINGHAM HOSPITAL SATURDAY FUND.

[King's Bench Division (Lewis, J.), **January 24, 25, 26, 1938.**]

Building Contracts—Extras—Existence of rock upon site—Not shown on plans or in bills of quantities.

A contractor agreed to erect a convalescent home and agreed (*inter alia*) that the conditions of contract contained in Bill No. 1 of the bills of quantities should form part of the contract. These bills were to be deemed to have been prepared in accordance with the standard method of measurement of building works last issued by the Chartered Surveyors' Institution, which required that, where practicable, the nature of the soil should be described and attention drawn to any existing trial holes, and that excavation in rock should be given separately. Bill No. 1 of the bills of quantities referred the contractor to the drawings, the block plan and the site to satisfy himself as to the local conditions and the full extent and nature of the operations. The bills of quantities contained no separate item for excavation in rock. The existence of rock upon the site was known to the architect. It was not, however, shown upon any of the plans nor referred to in the bills of quantities :—

Held : in the circumstances, the contractor was entitled to treat the excavation in rock as an extra, and to be paid the extra cost of the excavation plus a fair profit.

[**EDITORIAL NOTE.** This case construes a standard form of contract for building works, and shows the necessity for the special provision for excavation in rock, where rock is found to exist. In the present case the existence of the rock was known to the architect, but owing to local conditions seems not to have been discoverable by an inspection of the site.

As to Extras, see HALSBURY, Hailsham Edn., Vol. 3, pp. 262-266, paras. 471-477 ; and for Cases, see DIGEST, Vol. 7, pp. 376-378, Nos. 173-180.]

Appeal by way of case stated from the award of an arbitrator. The material parts of the case stated are set out in the judgment.

H. I. P. Hallett, K.C., and *Stephen Chapman* for the claimants.

W. T. Creswell, K.C., and *W. R. Hornby Steer* for the respondents.

Lewis, J. : This case comes before me in the form of a special case stated by Mr. P. M. Fraser, a distinguished architect. The subject-matter is a building contract, with regard to which Messrs. C. Bryant & Son, Ltd., who are builders, had disagreements with the Birmingham Hospital Saturday Fund, the respondents. The contract was in connection with the building of a convalescent home at Weston-super-Mare. It was a lump sum contract, and the bill of quantities formed part of the contract. The matter which came before the arbitrator arose with regard to a claim which the builders made to be paid a sum of money in respect of blasting and quarrying through rock, which they found when they came to prepare the site for the convalescent home. Put quite shortly and in non-technical language, the claimants say that this work was not part of the contract price, which was a sum of £44,000. The building owners, the Birmingham Hospital Saturday Fund, say : "No, it is all included in the contract, and, if you found that it was more expensive than you thought, that is your own look-out, and we are not going to pay you extra for it." The case has been argued by

Mr. Hallett and by Mr. Creswell with their usual ability, and my attention has been drawn to two principles. First of all, it is said that in these contracts a contractor cannot say, if he has undertaken work, that he has found difficulties in carrying it out, and therefore he is not entitled to say: "Because of those difficulties I am going to give up the contract or claim more money for it." The second principle is that the bills of quantities, when they are made part of the contract, contain the description of work and define the work which is to be done.

The matter, as I have said, came before a distinguished architect, and he has stated his award in the form of a special case. He has found certain facts, and it is most convenient, I think, for me to read so much of the case as finds all those facts. The arbitrator states:

> 1. By a contract dated Sept. 2, 1931, made between the respondents (the employer) of the one part and the claimants (the contractor) of the other part the contractor agreed to erect for the employer premises for a convalescent home for women at Kewstoke, Weston-super-Mare, Somerset, for the sum of £44,210. A copy of the contract is attached to this case and is the form of contract first issued by the Royal Institute of British Architects in or about July, 1931. A copy of Bill No. 1 and an extract from Bill No. 2, part of the bills of quantities, are attached to this case. In the conditions referred to in the said contract, a cl. 2 (*a*) is typed into the printed form, which states as follows: "It is agreed that the conditions of contract contained in Bill No. 1 of the bills of quantities shall form part of this contract." 2. Disputes and differences arose between the claimants and the respondents as to whether the claimants are entitled to any, and, if so, what, extra sum in respect of excavation in rock done by them in connection with the said works, and the same and all other matters in dispute between the parties in connection with the said contract were referred by the said submission to the award, order and final determination of myself. 3. Clause 11 of the conditions of the contract provides (*inter alia*) as follows: "The quality and quantity of the work included in the contract sum shall be deemed to be that which is set out in the bills of quantities, which bills, unless otherwise stated, shall be deemed to have been prepared in accordance with the standard method of measurement of building works last before issued by the Chartered Surveyors' Institution. Any error in description or in quantity in, or omission of items from, the bills of quantities shall not vitiate this contract, and shall be rectified and treated as an extra or omission, as the case may be, under cl. 10 hereof, and the value thereof shall be added to or deducted from the contract sum (as the case may be), provided that there shall be no rectification of errors in the prices inserted by the contractor in the said bills of quantities." The standard method of measurement of building works last issued by the Chartered Surveyors' Institution prior to the contract provides (*inter alia*) as follows: "Where practicable the nature of the soil shall be described and attention shall be drawn to any existing trial holes. Excavation in rock shall be given separately." Bill No. 1 of the bills of quantities referred to in cl. 2 (*a*) of the contract includes (*inter alia*) the following words: "The contractor is referred to the drawings, which may be inspected at the architect's offices, and to the block plan attached and to the site to satisfy himself as to the local conditions, the working space available, the accessibility of the site, the full extent and nature of the operations, the supply and conditions affecting labour and the execution of the contract generally, and no claim on the ground of want of knowledge in such respects or otherwise will be entertained"; "The R.I.B.A. form of contract and schedule of conditions shall be adopted for these works, and the contractor is referred thereto for more detailed particulars of the clauses briefly enumerated below, and he is to allow for all costs and expenses these may entail." It was admitted by the parties that, at the time of the preparation of the bills of quantities, the R.I.B.A. form of contract and schedule of conditions referred to in Bill No. 1 was the R.I.B.A. form of contract and schedule of conditions published in 1909 and withdrawn from circulation in or about July, 1931, on the publication of the 1931 form of contract. A copy of the form of 1909 contract is attached to this case. The conditions to the form of 1909 contract differ considerably from the conditions to the form of 1931 contract, and do not include the reference to the standard method of measurement of building works. Points of claim and points of defence were delivered by the respective parties to this arbitration, and copies are attached to this case.

Then he sets out the contents of the points of claim and defence, and states that the arbitration proceeded before him. He then proceeds to find the following facts:

> 5. The following facts were admitted or proved to my satisfaction: (*a*) the several bills of quantities were issued by a Mr. Voisey, the quantity surveyor, to various contractors, including the claimants, in instalments starting on July 24, 1931, and finishing on July 31, 1931. Page 9 of the bills of quantities provided (*inter alia*) as follows: "Excavator. The contractor is particularly referred to the plans of the levels and to the site and the two trial holes to ascertain and see for himself the condition and nature of the excavations required"; "Include for removing any natural stone or rock that may be encountered in the excavations." (*b*) Excavation in rock is not given separately. (*c*) No specification was issued to the contractor with the bills of quantities. (*d*) Five trial holes were dug, and the claimants inspected the site and inspected two of the five trial holes, which inspection did not disclose that any excavation in rock would be necessary. The trial holes were in no case more than 3 ft. 6 ins. deep, whereas the digging involved in the foundation work was of much greater depth. (*e*) Of the five trial holes, altogether three did not disclose rock, but in two there was evidence of rock. There was no evidence to show which of the five trial holes was inspected, nor were the claimants aware that there were more than two trial holes referred to in the bill of quantities to be inspected. Further, in consequence of the state of the site and the very long grass growing thereon, it was not reasonable to expect the claimants after having seen two trial holes to search and ascertain the existence of three more trial holes of which they were not aware. (*f*) The plans referred to in the contract gave no indication of the existence of rock. (*g*) The tenders were submitted on Aug. 15, 1931, and the contract was signed on Sept. 2, 1931. When the time arrived for the contract to be signed, the architect, Mr. W. H. Martin, agreed, at the claimants' request, to use the 1931 form. The associations representing the architects and the builders had urged upon their members in or about July, 1931, to use the 1931 form of contract. (*h*) Clause 2 (*a*) of the conditions of the contract [the clause that was written in] was inserted by and at the suggestion of Mr. Voisey, the quantity surveyor. (*i*) There was evidence of rock on other parts of the site, and the architect was aware of the fact. The architect should therefore have made definite reference to the nature and extent of the rock in the bills of quantities which were prepared on his instructions, but in fact no reference was made other than the words "Include for removing any natural stone or rock that may be encountered in the excavation," which cannot fairly be read to indicate the blasting and lifting of rock below the surface. The two shallow trial holes inspected by the claimants pursuant to the bills of quantities and the particulars given are inadequate if excavating in rock were included. It was an impossible task to put upon the claimants to ascertain the nature and extent of the foundations before commencing their contract. The bills of quantities do not describe separately digging in the various kinds of soil. 6. The contract having been entered into, the claimants proceeded with the work, and, in making the necessary excavations, encountered rock. They complained when rock was found, and asked for an extra order, but the clerk of the works insisted that the claimants had to excavate rock or any other soil as part of their contract. Over 5,000 cubic yards of digging was involved, and the actual quantities of (A) loose ordinary soil and (B) solid rock were not known until the last yard of excavation was completed. The claimants allege that nearly 4,500 yards of solid rock had to be excavated, which involved quarrying and blasting, and this fact was not contested by the respondents. The claimants' prices in the bills of quantities and the contract amount do not include for excavating in rock. The actual cost of excavating in rock is very considerably higher than the contractor's prices for digging in the bills of quantities. 7. In so far as it is a question of fact, I find, and, in so far as it is a question of law, I hold, subject to the opinion of the court, that cl. 11 of the conditions in the schedule to the contract applies, and the claimants are entitled to the extra cost of excavating rock plus a fair profit. 8. By agreement between the parties, no evidence was called as to the actual measurement and value of the extra work caused by excavating in rock, it being agreed that the same should be deferred pending the question of liability being determined, and that, if necessary, and failing agreement between the parties, I should deal with the question of value hereafter. 9. The question for the opinion of the court is whether, upon the facts herein stated, the claimants are entitled to be paid any extra sum in respect of excavation in rock done by them in connection with the works.

He then sets out his interim award in alternative forms, saying that, if he is right, in his view the company is entitled to recover such sums to be ascertained, and that, if he is wrong, then the company is to recover nothing.

As I said, I have heard the case argued by the respective counsel, and I think that the matter, although at one time it appeared somewhat complicated, is not really so difficult as it appears. Mr. Creswell has quite frankly and promptly stated that, if cl. 11—that is, cl. 11 in the 1931 form of contract—is included in the contract, he is wrong, and the builder is entitled to recover. What the arbitrator has found as a fact is that the condition which appears in the first part of cl. 11, namely—

> The quality and quantity of the work included in the contract sum shall be deemed to be that which is set out in the bills of quantities, which bills, unless otherwise stated, shall be deemed to have been prepared in accordance with the standard method of measurement of building works last before issued by the Chartered Surveyors' Institution

—was not carried out, because, as he stated, and as I have read, in his award, that standard method of measurement stated: "Excavation in rock shall be given separately." There is no question, in the view of the arbitrator, and, indeed, in my view, if there is any doubt about it, that the excavation of rock was not given separately. Therefore, if that cl. 11 is part of the contract, Mr. Creswell has already quite frankly stated that he is wrong. There was some discussion as to whether or not cl. 11 was incorporated in this contract. I am quite satisfied, if it be a question of law for me to decide, that cl. 11 is included in the contract. The contract consists of the printed document, which is the 1931 form of R.I.B.A. contract, with certain alterations, certain clauses having been cut out by the parties, and cl. 2 (*a*), which is the written-in clause, has been inserted. Clause 2 (*a*) states:

> It is agreed that the conditions of contract contained in Bill No. 1 of the bills of quantities shall form part of this contract.

When one looks at the conditions of contract contained in Bill No. 1 of the bills of quantities, one finds that there is a reference to the conditions and clauses of the 1909 form of contract. The arbitrator has set out quite accurately—and, indeed, even if it was not accurate, these are findings of fact which I cannot amend—that in fact what happened was that this new form of 1931 contract was just coming into use, and was just being printed, at the time when the parties were negotiating for the contract, but that they had set out in their bills of quantities, and referred the builder to, the terms and clauses of the 1909 form of contract. Then, just before the contract was signed, the parties elected to use the 1931 form, inserting in the form the cl. 2 (*a*) to which I have already referred. It seems to me quite clear that the contract, therefore, consists of the 1931 form as amended by the parties. It incorporates the 1909 form, and it also, of course, incorporates the bills of quantities and the conditions appearing in the bills of quantities. Unless it can be said that there is anything which contradicts cl. 11 of the 1931 form, it must be taken that the parties knew what they were doing, and that they intended that cl. 11 should apply. I have heard the matter argued, and it is pointed out by Mr. Hallett that there is nothing in cl. 11 which in any way contradicts any clause in the 1909 form, or any other condition of the contract. In my view, Mr. Hallett is right as regards that, and there is nothing in cl. 11 which cannot be reconciled with any of the other clauses in the contract, including cl. 12 (*a*) of the form of 1909. That being so, the position is that cl. 11 applies to this contract. Mr. Hallett has pointed out, quite rightly, that all that cl. 11 does, in so far as it concerns cl. 12 (*a*) of the 1909 form of contract, is to explain and enlarge the terms of cl. 12 (*a*), and that it contains nothing which contradicts cl. 12 (*a*). That is the view which I am satisfied is the correct one. That being so, I find that cl. 11 of the 1931 form formed part of this contract, and Mr. Creswell quite properly and frankly stated that, if cl. 11 applied, that, so far as he was concerned, was an end of the case. My view is that cl. 11 does apply. Therefore, I must pronounce that the arbitrator is right in what he terms his findings of fact, and I am satisfied that that was a correct finding, in so far as it is a question of law, where he states:

> In so far as it is a question of law, I hold, subject to the opinion of the court, that cl. 11 of the conditions in the schedule to the contract applies, and the claimants are entitled to the extra cost of excavating rock plus a fair profit.

Therefore, the first limb of his final award is the correct one, namely:

> If the court shall be of opinion in the affirmative, then I find and award that the claimants are entitled to recover against the respondents the value of the additional expense incurred in excavating in rock under cl. 11 of the conditions of contract, the amount whereof is to be ascertained by me in case the parties differ. And I award and direct that the respondents do pay to the claimants their costs of the reference and also the costs of this my award.

I am satisfied that that is right, and that the claimants must have the costs.

Creswell, K.C., referred to the Arbitration Act, 1934, s. 9, and asked for leave to appeal so far as it might be necessary.

LEWIS, J.: My view is that this is a case in which you can appeal by right to the Court of Appeal.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Evershed & Tomkinson*, Birmingham (for the claimants); *Needham & Barrow*, agents for *S. J. Grey & Willcox*, Birmingham (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

POULDEN *v.* POULDEN AND ALEXANDER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **January 13, 14, 18, 19, 20, 21, 27, 1938.**]

Divorce—Connivance—Adultery brought about by inquiry agent employed by husband—Presumption of law—Onus of proof—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 4.

It was proved that the adultery of the respondent wife was brought about by the connivance of a female inquiry agent employed on behalf of the petitioner :—

HELD : (i) the onus of proving connivance is not now upon the person alleging its existence.

(ii) the Matrimonial Causes Act, 1937, s. 4, applies to proceedings commenced before Jan. 1, 1938.

(iii) the word " petitioner " in the Matrimonial Causes Act, 1937, s. 4, where it requires that " the petitioner has not in any manner been accessory to or connived at . . . the adultery ", includes an agent of the petitioner.

[**EDITORIAL NOTE.** This case confirms the view taken of the recent Act amending the law relating to matrimonial causes that it is not now for the party setting up connivance to establish its existence, and so rebut the presumption of law against it. The present position is that the court must dismiss the petition unless it is satisfied that there has been no connivance. In this and other matters dealt with in the Matrimonial Causes Act, 1937, s. 4, the position is the same whether the petition is presented before or after Jan. 1, 1938.

AS TO CONNIVANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999 ; and FOR CASES, see DIGEST, Vol. 27, pp. 326-332, Nos. 3052-3122.]

Case referred to :

(1) *Gower* v. *Gower* (1872), L.R. 2 P. & D. 428 ; 27 Digest 331, *3099* ; 41 L.J.P. & M. 49 ; 27 L.T. 43.

HUSBAND'S PETITION FOR DIVORCE. The suit was brought by Albert Arthur Edward Poulden for dissolution of his marriage with Violet May Poulden on the ground of her adultery. There were two charges in the petition as amended : a charge of adultery with men whose names are unknown to the petitioner at Bournemouth in Jan.-Feb., 1936 ; a charge of adultery with a man whose name is unknown to the petitioner on Apr. 21, 1936, at the Regent Palace Hotel, London ; and a charge of adultery with Cyril Alexander on the night of Apr. 23 at the same hotel. Leave to dispense with personal service on Cyril Alexander was duly given, as his whereabouts was unknown, and service by advertisement was substituted. He did not appear or give any evidence in the cause. The respondent by her answer, as amended, formulated three defences : a denial of adultery, a charge of connivance by the petitioner at her adultery, which, if proved, would be an absolute bar, and a charge of conduct by the petitioner conducing to her adultery, which, if proved, would be a discretionary bar.

The relevant facts upon the connivance issue, upon which alone the case is reported, are as follow. In Mar., 1936, the husband employed a private detective agency, which sent a Mrs. Graham to Westcliff, where the respondent was then living. Graham visited the respondent's house at Westcliff, secured accommodation there, and cultivated her friendship. After 5 weeks, Graham and the respondent visited London, staying at two hotels there. Graham denied that she suggested this visit. On the evening of Apr. 23 the respondent and Graham had some refreshment with two men at a restaurant and then returned with them to the hotel, where adultery was alleged to have taken place. At the hotel two double rooms had been booked in the names of "Mr. and Mrs. Graham" and "Mr. and Mrs. Summers." It was admitted that Mrs. Graham and the respondent were in one of these bedrooms with the two men, whom they had not met before that evening, and that Mrs. Graham and one of the men left the respondent and the other man alone in the room. According to the evidence of Mrs. Graham, the man left behind had expressed his intention of staying the night, and she (Mrs. Graham) left them there without making any attempt to get either the respondent or the man out of the room or any kind of protest.

Hon. Edward Duke for the petitioner.

R. H. Bayford for the respondent.

BUCKNILL, J. [His Lordship dealt with the issue of adultery and found the last charge proved]: I next deal with the question of connivance. I am not satisfied that Graham was not accessory to, and did not connive at, the adultery of the respondent. I do not accept her evidence with regard to the origin of the visit to London, nor her ignorance of the nature of the entry at the Strand Palace Hotel. I regard her conduct on the night of Apr. 23, in being a party to taking two men to the bedroom and leaving Mrs. Poulden alone with one man, as conduct deliberately intended to promote adultery by Mrs. Poulden. I regard with considerable suspicion the failure to produce accounts with reference to her expenditure in London. It tends to corroborate that Graham paid for the bedrooms.

How far, then, does the conduct of Graham affect the petitioner? In 1872, LORD PENZANCE decided the case of *Gower* v. *Gower* (1). The facts of that case are, put in another way, identical with those here. It was a case where the husband had separated from his wife and had then employed a man to watch her, and to quote the judgment of LORD PENZANCE (at p. 432) as to what happened:

> In the total absence of any evidence on the other side, the court cannot but give credence to their story so far as to believe that Williams induced and brought about their going to bed together. To what extent they were intoxicated when they went to bed it might be difficult to ascertain; but that they were brought to the place by the contrivance of Williams, for the purpose of being discovered committing adultery, is the conclusion at which the court is forced to arrive.

LORD PENZANCE continued, at pp. 433, 434:

> . . . . I desire to state distinctly and broadly, in order that, if I am wrong, I may be corrected by a Court of Appeal, that in my opinion, if a husband employs a man to get evidence of adultery upon which to obtain a divorce, and the man so employed sets about to procure the defilement of the wife, and by the intervention of that man the wife is purposely induced to commit adultery, the petitioner has no right

> to a remedy in this court for such adultery; and I further think that the husband would have no right to a remedy even if it were proved that he had not given any distinct orders for the purpose . . . . I decide the case on the broader ground that the petitioner cannot obtain the benefit of redress in this court for an act of adultery brought about by his own agent.

When this case was decided, the law on connivance was contained in the Matrimonial Causes Act, 1857, s. 31, and the result of that Act was to throw on the person alleging connivance the burden of proof. I think the law at that time was correctly stated in RAYDEN ON DIVORCE, 3rd Edn., p. 115:

> The presumption of law is against the existence of connivance, and, to establish it, the intention must be clearly shown.

The wording, however, of the new statute, which came into force on Jan. 1, 1938, is different. Mr. Duke submitted that that statute does not apply to this case, but, in my judgment, sect. 4 of the statute clearly does apply. The material words of the Matrimonial Causes Act, 1937, s. 4, so far as this case is concerned, on the question of connivance, are these:

> On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any countercharge which is made against the petitioner. If the court is satisfied on the evidence that (i) the case for the petitioner has been proved; and (ii) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and (iii) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents; the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition.

The judgment of LORD PENZANCE in the case to which I have referred seems to me to decide in effect that the word "petitioner" in the section dealing with connivance includes his agent employed by him to get evidence of adultery, and that, if such an agent in the course of his employment connives at adultery, the petitioner is debarred from obtaining his remedy. The rule seems fair and just as between husband and wife. Divorce for adultery is granted because of the intolerable injury to marriage which that offence constitutes, but, if it has been deliberately promoted by the petitioner, or by his agent employed by him to get evidence, the petitioner cannot be heard to complain of his injury, and is debarred.

I am not satisfied that the petitioner through his agent has not been accessory to, or connived at, the adultery. That being so, the statute requires that the petition be dismissed.

Petition dismissed.

Solicitors: *De Meza & Menasse* (for the petitioner); *Druces & Attlee* (for the respondent).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

ASSOCIATED DISTRIBUTORS, LTD. *v.* HALL AND HALL.

[COURT OF APPEAL (Slesser, Scott and Clauson, L.JJ.), **February 3, 4, 1938.**]

Hire Purchase—Minimum payment clause—Termination of agreement by hirer—Liability for minimum payment—Penalty or liquidated damages.

The defendant entered into a hire-purchase agreement with the plaintiffs in respect of a bicycle. The agreement provided in one clause for its determination by the hirer, and in another clause for its determination by the owners. In a further clause it provided that, if the agreement was determined for any cause whatsoever, the hirer should pay to the owners such sum as together with the sums already paid amounted to half the price of the bicycle. The hirer determined the agreement under the first-mentioned clause, and it was contended that the last-mentioned clause imposed the payment of a penalty, and not of liquidated damages:—

HELD: as the defendant had exercised an option given to himself by the agreement to determine it, no question of whether the payment was a penalty or liquidated damages could arise, and he was liable to make the payment stipulated for in the agreement.

[**EDITORIAL NOTE.** This case deals only with the position where the hirer determines the contract, deciding that in this event the hirer must pay the sum fixed as a minimum payment.

AS TO PAYMENTS UNDER HIRE-PURCHASE AGREEMENTS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 519-522, paras. 765-768; and FOR CASES, see DIGEST, Vol. 3, p. 95, Nos. 251, 252.]

Cases referred to:

(1) *Elsey & Co., Ltd.* v. *Hyde* (1926), JONES & PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW, 2nd Edn., p. 107.

(2) *Roadways Transport Development, Ltd.* v. *Browne & Gray* (1927), JONES & PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW, 2nd Edn., p. 118.

(3) *Chester & Cole, Ltd.* v. *Wright* (1930), JONES & PROUDFOOT'S NOTES ON HIRE-PURCHASE LAW, 2nd Edn., p. 124.

APPEAL by leave, upon terms that the appellants pay all costs in any event, from a decision of His Honour JUDGE LONGSON at the Alfreton County Court, delivered at Derby, and dated July 7, 1937.

Eric Sachs for the appellants.

A. Melford Stevenson for the respondents.

Sachs: Once the hiring is determined, from whatever reason, half the purchase price must be paid. This is to cover depreciation, and is not a penalty clause. [Counsel referred to *Elsey & Co., Ltd.* v. *Hyde* (1), *Roadways Transport Development, Ltd.* v. *Browne & Gray* (2), and *Chester & Cole, Ltd.* v. *Wright* (3).] The judge did not have these cases before him, or the decision might have been different. It is submitted that this was neither a penalty nor liquidated damages. Clause 7 of the agreement provides for a certain sum to be paid if the hirer exercises a certain option. He did so exercise the option. Alternatively, this is liquidated damages, and not a penalty clause. A minimum payment clause is in every hire-purchase agreement.

Stevenson: The hirer exercised a right which the contract gave him.

To support the judgment, I should have to contend that the hirer committed a breach of the agreement. That cannot be maintained.

Slesser, L.J.: This appeal must be allowed. The county court judge in this case considered the particular case which we have here been considering along with three other cases. They were all cases arising out of hire-purchase agreements, as they are called, in the form substantially of the agreement in the case which we have here to consider. They all turn in particular upon the construction of cl. 7 of the agreements, into one of which the defendant here entered. The agreement, which was for the hiring of a Sheffield Dunelt bicycle of a tandem type with a three-speed gear, was for the sum of £15 19*s*. 6*d*., together with extras, £1 4*s*. 6*d*., making £17 4*s*. in all as the total hire purchase of the bicycle. By cl. 1 of the agreement the hirer agreed to hire the goods for a period of 53 weeks. He enclosed an initial hire rent of £1 10*s*., and agreed to pay " at the above address," which was the address of the company, or at such other address as might be required, 52 further consecutive weekly rents of 6*s*. and one payment of 2*s*. There followed certain obligations as to his keeping the goods in good order and condition and punctually paying the rent, and other obligations which need not be considered in this case. Then followed in cl. 5 these words:

> I may at any time terminate the hiring by returning the goods to you at such address as you may direct at my own risk and cost but I shall remain liable for rent (including apportioned rent for any broken period) up to the date of such return and for all other sums payable under this agreement and damages (if any) for breach of any term or condition hereof.

To that is added by cl. 7 this rider:

> In the event of this agreement or the hiring being determined for any cause whatsoever, no allowance return credit or payment shall be allowed or paid to me but I will pay to you by way of compensation for depreciation of the goods in addition to any other sums payable hereunder such sums as with the amount previously paid for rent shall make up a sum equivalent to not less than one-half of the total amount including the option purchase price payable under this agreement.

This hirer in fact did terminate his hiring under cl. 5 of the agreement, and thereby it was said that he became liable to pay the sum mentioned in cl. 7 of the agreement. The difficulty in this case has arisen from the fact that cl. 7 of the agreement contemplates, not only a termination of the hiring by the hirer, which is an option which the hirer is entitled to exercise on the conditions set out in cl. 7 with consequences following, but also that the agreement may be terminated by the owner under the conditions of cl. 6, which are as follow:

> If I [the hirer] default in payment of any sums due hereunder or if I commit any breach of any term or condition of this agreement you [the owner] may determine the hiring.

There have been a number of cases, none of which has apparently been reported otherwise than as an appendix in Jones & Proudfoot, Notes on Hire-Purchase Law, 2nd Edn., all of which turned upon cl. 6. That is to say, where there has been a default in payment, or a breach of a term or condition, and the agreement itself has been determined by the owner. In such cases, the question has arisen whether the sum which the owner may claim by way of compensation for depreciation of the goods, in addition to any other sums payable as provided in cl. 7, is liquidated damages or penalty. The cases, as I understand them—two cases in the Divisional Court and a decision in the Court of Appeal—seem to establish the view that they are to be regarded as liquidated damages, but it is not necessary in this case for us to express any opinion upon those decisions, because they have nothing to do with the case which we are here to consider. This is a case where the hirer has elected to terminate the hiring. He has exercised an option, and the terms on which he may exercise the option are those set out in cl. 7. The question, therefore, whether these payments constitute liquidated damages or penalty does not arise in the present case for determination.

The judge, having heard one case where the hirer had elected to terminate, and other cases where the owner had taken advantage of cl. 6 by reason of some default, appears to have treated all the cases as cases appropriate to cl. 6, being cases in the nature of default, and not as cases where the hirer exercised an option. In the absence of authority such as has been cited to us—for which one can well forgive him, seeing, first of all, as it appears from his note, that no authorities were cited, and, secondly, that they are to be obtained only by industrious researches into text-books, none of them having been reported—he came to the conclusion that these provisions in cl. 7 for a payment as compensation for depreciation of the goods were in the nature of a penalty. He appears to have been struck by the fact that, if they were a genuine pre-estimate of damage, the peculiar circumstance follows that, the more the goods were depreciated, the less the damages, which seemed contrary to both natural and economic law. But, however that may be, he evidently was oblivious of the fact that the particular case we have here to consider was a case of payment with the exercise of an option. It follows in this case that no question of penalty or liquidated damage arises at all, and, therefore, that the money for which the hirer has made himself liable must be paid, and cannot be impeached on any principle of law. The appeal, therefore, must be allowed.

Scott, L.J.: I agree. I should like to add that, although the judge of the county court dealt with three other cases at the same time, and put his judgment in all four cases into one single judgment, we are expressing no opinion at all on the other three cases, which have not been before us. But, in regard to this case, I think he gave his judgment upon a complete misapprehension of the application of the facts to the particular agreement in question, and I entirely agree with what Slesser, L.J., has said.

Clauson, L.J.: I agree. I would venture to add only this. The form of contract before us is so framed that the young person who, wanting to hire a bicycle, enters into it is in any event liable to pay sooner or later one half of the total purchase price, even if in fact he uses the bicycle for only a short period. We are told by counsel that the clause which has this effect is commonly known amongst those familiar with these matters as the "minimum payment" clause. I venture to suggest that it would save much misunderstanding, and would A certainly conduce to the reputation of those who hire out bicycles upon these conditions being that of honest traders, if they were to take steps whenever this form of contract is used to make it clear, if possible, by a statement on the face of the contract, that the young person who enters into it is under the liability I have indicated. B

Appeal allowed.

Solicitors: *Peacock & Goddard*, agents for *E. V. Brown, White & Pears*, Nottingham (for the appellants); *Wrinch & Fisher*, agents for *Rickards & Cleaver*, Alfreton (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*] C

BANK OF ATHENS SOCIÉTÉ ANONYME *v.* ROYAL EXCHANGE ASSURANCE.

[KING'S BENCH DIVISION (Branson, J.), **February 1, 1938.**] D

Practice—Interest—Discretion of court to award—Proceedings commenced before coming into force of the Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41), *s.* 3 (1).

The discretion given to the court by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), to award interest may be exercised in proceedings commenced before that section came into force as well as E in proceedings commenced thereafter.

[**EDITORIAL NOTE.** The difficulties in the way of the court awarding interest on sums recovered in legal proceedings were removed by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), and it is now decided that this section is applicable to all proceedings, whenever they may have been commenced.

AS TO INTEREST, see HALSBURY, Hailsham Edn., Vol. 23, pp. 177, 178, paras. F 256, 257; and see YEARLY SUPREME COURT PRACTICE, 1938, p. 19.]

APPLICATION that the plaintiffs might be ordered to pay interest upon a sum of £180, money of the defendants, in the hands of the plaintiffs. The only contest was whether the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), applied to proceedings commenced before G the Act came into force. A Greek steamer was in this action found to have been deliberately cast away with the connivance of the owners. The defendants as insurers of the ship had, before the action, paid £180 on account of the insurance monies payable on the loss to the plaintiffs, who were mortgagees of the ship. The latter, although they were in H no way connected with the scuttling of the ship, consented to a judgment for the return of the £180 to the defendants with costs.

The Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), provides as follows:

In any proceedings tried in any court of record for the recovery of any debt or

> damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section (*a*) shall authorise the giving of interest upon interest; or (*b*) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or (*c*) shall affect the damages recoverable for the dishonour of a bill of exchange.

W. L. McNair for the plaintiffs.

Cyril T. G. R. Miller for the defendants.

BRANSON, J.: This application raises a neat point on the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1). I think that upon the true construction of that section the court in any proceedings, whenever commenced, whether before or after the coming into force of the Act, has the discretion which the section gives it. The words as they stand are applicable in that sense. If it was intended to restrict the application to proceedings commenced after the Act had come into force, I think that one would have expected to find the appropriate words in the section. I therefore consider that I have the jurisdiction and discretion which the section gives. With regard to the exercise of it, I do not think that one need discuss the question as to how the money came to be paid over, and when it was paid. The plaintiffs have £180, which now appears to have been the defendants' money, in their pockets, and I suppose earning interest for them since Feb. 3, 1933. I see no reason in fairness, now that the court is going to order that by consent the £180 should be paid over, that that payment should not be accompanied by a reasonable rate of interest as and from Feb. 3, 1933. What that rate should be is a matter to some extent of guess-work. I should say 4 per cent.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the plaintiffs); *Richards, Butler, Stokes & Woodham Smith* (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

R. *v.* AMES. R. *v.* CAREY.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Branson and Macnaghten, JJ.), **February 7, 1938.**]

Criminal Law—Sentence—Concurrent or consecutive sentences—Further charges which might have been taken into consideration on previous trial.

In Oct., 1937, the appellants were sentenced to 4 years' penal servitude and 21 months' imprisonment with hard labour, respectively, for shopbreaking offences. In Jan., 1938, they were again sentenced to 3 years' penal servitude and 12 months' imprisonment with hard labour, respectively, for similar offences, and these sentences were ordered to be consecutive to those of Oct., 1937. In both cases, the sentences were severe on account of the bad record of the prisoners:—

HELD: as the bad record of the prisoners had been taken into account on the first occasion, the fairer order was that the sentences passed upon the appellants in Jan., 1938, should be concurrent with the sentences passed in Oct., 1937.

[**EDITORIAL NOTE.** The offences which were the subject of the second trial could, if they had been admitted, have been taken into consideration upon the first trial. For some reason, apparently because they were not admitted, they were not so taken into consideration, although two other similar offences were. In these circumstances, the court has thought that it would be fairer if the two severe sentences—both made severe on account of the past bad record of the appellants—were made to run concurrently, and not consecutively.

As to Concurrent or Consecutive Sentences, see HALSBURY, Hailsham Edn., Vol. 9, pp. 228, 229, para. 321 ; and for Cases, see DIGEST, Vol. 14, pp. 476, 477, Nos. 5171-5192.]

Appeal by leave against sentences passed upon the appellants at the quarter sessions for Buckinghamshire.

No counsel were instructed in these appeals.

Lord Hewart, L.C.J. [delivering the judgment of the court] : These two appellants, Elsie Florence Carey and Albert Ames, were charged, together with another person, at the Buckinghamshire quarter sessions on an indictment which charged them with shop-breaking and with stealing a quantity of goods to the value of £101, and £2 2*s.* 6*d.* in money, on Aug. 26, 1937. Carey was convicted after a plea of not guilty. Ames pleaded guilty. On Jan. 3, 1938, Carey was sentenced to 3 years' penal servitude and Ames was sentenced to 12 months' imprisonment with hard labour. Both sentences were ordered to be consecutive to certain sentences passed at Oxford Assizes by Finlay, J., on Oct. 22, 1937. On that occasion, Finlay, J., sentenced Carey to 4 years' penal servitude and Ames to 21 months' imprisonment with hard labour for similar offences. The appellants now appeal by leave against their sentences.

The case with which Finlay, J., was dealing in Oct., 1937, was a case where a costumier's shop in Oxford had been broken into by Ames after it had been locked up on early-closing day. A quantity of fur coats was collected in piles inside the shop, and £4 in cash was taken from the till, while Elsie Florence Carey kept watch outside the shop. She was dressed as a man. Another man waited in a motor car, in which she subsequently departed. Fortunately, however, a suspicious neighbour observed the number of the car, which was stopped by the police. The car was being driven by the other man, Swan, with Carey in it. In the car were two empty suitcases, some dust-sheets, and a key which fitted the doors of the back of the shop-windows. On that occasion Carey asked for two other cases to be taken into consideration. They were cases of shop-breaking at Bognor and at Worthing, in which she and Ames had stolen about £367 worth of goods, some ten days before the case at Oxford. The judge, in passing sentence on that occasion, said that he regarded the case as one which called for a very severe sentence, and hoped that a term of imprisonment might reform this young woman. The offence, the subject of this appeal, had already been committed before that sentence was passed, but, for some reason, presumably because it was not admitted, this case was not taken into consideration. In the present case, a shop in Slough which was locked up on early-closing day, on Aug. 25, 1937, was broken into, and on the following day it was discovered that a quantity of goods had been taken away from it. It was exactly the same type of case as the case referred to in the indictment at Oxford. The appellants were both engaged in it, and both offences were planned and committed with the aid of a motor car. With regard to the case at Oxford, an appeal by Carey to this court was dismissed. We then pointed out that she had five previous convictions, and asked for two other cases to be taken into consideration. Ames appealed against that sentence, but abandoned his appeal.

The question we have to consider is this: If this case at Slough had been included with the other two cases taken into consideration by FINLAY, J., in passing sentence at Oxford, would he have then passed a longer sentence than he did in fact pass in the case before him with the two other cases taken into consideration? In other words, would he, on Oct. 22, 1937, have passed a sentence longer than 4 years' penal servitude in the case of Carey, or a sentence longer than 21 months' imprisonment with hard labour in the case of Ames?

We are inclined to think that he would not, and that the fairer course would be to regard these offences at Slough as he would in all probability have regarded them if admitted by these appellants and had taken them into consideration. We think, further, that a fairer result of this appeal would be that these sentences, passed at the quarter sessions at Aylesbury, should not be consecutive to, but concurrent with, the sentences passed by FINLAY, J., in Oxford. We cannot help observing that the very reasons which were offered by the court of quarter sessions for passing the sentences they passed were precisely the same as those of FINLAY, J., when he passed the sentences at Oxford.

Solicitor: *Registrar of the Court of Criminal Appeal.*

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Re INSOLE'S SETTLEMENT.

[CHANCERY DIVISION (Simonds, J.), **February 2, 1938.**]

Land Improvement—Structural additions to mansion house—Necessity for additions to adjoin house—Settled Land Act, 1925 (c. 18), *Sched.* III, *Part* II, *para.* 5.

Upon certain land, which was settled land within the Settled Land Act, 1925, there had been erected at a distance ranging from 30 ft. to 50 ft. from the mansion house a row of glasshouses, garages, a chauffeur's flat, a battery-room, toolshed, boiler-house and workshop. The trustees for the purposes of the Settled Land Act asked that the expense of erecting these premises might be paid out of capital money as structural additions to buildings within the Settled Land Act, 1925, Sched. III, Part II, para. 5:—

HELD: the new buildings being at a substantial distance from the mansion house, they were not a structural addition thereto, and therefore not authorised improvements within the above paragraph.

[**EDITORIAL NOTE.** This case deals with the meaning of the phrase " structural additions to buildings " in the Settled Land Act, 1925, Sched. III, Part II. The point decided is that an addition to a building must be something that is quite close to, if not actually adjoining, the building itself, and that erections from 30 ft. to 50 ft. away cannot be additions.

As to Improvements under Part II, see HALSBURY, Hailsham Edn., Vol. 19, pp. 386, 387, para. 791 ; and for Cases, see DIGEST, Vol. 30, pp. 286-288, Nos. 128-143.]

Cases referred to :

(1) *Re Blagrave's Settled Estates*, [1903] 1 Ch. 560 ; 30 Digest 287, *129* ; 72 L.J.Ch. 317 ; 88 L.T. 253.

(2) *Re Gerard's (Lord) Settled Estate*, [1893] 3 Ch. 252 ; 30 Digest 288, *145* ; 63 L.J.Ch. 23 ; 69 L.T. 393.

(3) *Re Leveson-Gower's Settled Estate*, [1905] 2 Ch. 95 ; 30 Digest 287, *139* ; 74 L.J.Ch. 540 ; 92 L.T. 836.

Originating Summons asking for the determination by the court of the question whether all or any and what part or parts of the works proposed to be or in course of being constructed by the tenant for life in possession upon the lands comprised in the settlement created by the will of James Harvey Insole, dated Apr. 30, 1898, will respectively constitute if and when completed authorised improvements to the settled land within the meaning (*a*) of Part II, or (*b*) of Part III, of the Settled Land Act, 1925. The works in question consisted of new glasshouses (with heating) and a new range of buildings comprising garages, chauffeur's flat, battery-room, toolshed, boiler-house and workshop.

G. P. Slade for the trustees.

H. Freeman for the tenant for life.

Evelyn Riviere for the tenant in tail in remainder.

Slade : All the persons who might be interested under the settlement are before the court, with the exception of newly-born issue who would take in priority to the tenant for tail in remainder. He, however, supports the application, and it therefore rests upon me to protect the interests of such issue. The question is whether the proposed improvements fall within the Settled Land Act, 1925, at all. In particular, the question is whether they come within Sched. III, Part II, para. 5. Can anything be said to be an addition to, or an alteration in, an existing building, if it stands by itself and is not actually contiguous to any existing building ? [Counsel referred to *Re Blagrave's Settled Estates* (1), *Re Lord Gerard's Settled Estate* (2), *Re Leveson-Gower's Settled Estate* (3).]

Freeman : The word additions means something more than mere enlargements. There may be a structural addition though it forms no integral part of the fabric of an already-existing structure, or there may be a structural addition which is contiguous to the original building, or there may be a new structure which will not be contiguous to, or form part of, the original building. The section is wide enough to let in that third class of case. It must be a question of fact in every case. There might be such a distance between the two that the new building could not be said to be an addition, and the circumstances which affect one case might not apply in another. If the buildings proposed in the present case are in such a position and for such purposes that they subserve the existing A building, they are an addition to that building. It is upon the same footing as a greenhouse built adjacent to a house, and it is submitted that this is a structural addition. [Counsel referred to *Re Lord Gerard's Settled Estate* (2), *Re Leveson-Gower's Settled Estate* (3).]

Riviere : My client takes the view that the proposed buildings would B be a beneficial alteration, and he would like them to be paid for out of capital moneys. Are the new proposed buildings so connected with the existing house that they could be built on to it ? They could be a part of the house which is standing there now. If there is any reason which requires that they should be placed near, instead of physically touching, C that is no cause for not regarding them as additional buildings. [Counsel referred to *Re Lord Gerard's Settled Estate* (2).]

SIMONDS, J. : This is an application by the trustees for the purposes of the Settled Land Act of a settlement created by the will, dated Apr. 30, D 1898, of James Harvey Insole, who died in 1901. The settlement was of an estate known as the Luxborough estate in the county of Somerset. That estate has been sold, and land has been acquired out of the proceeds of sale and it is held to the uses of that settlement. It consists of property in the county of Hants, and consists of two farms of something over 800 E acres each. There is upon that property a mansion house, and it is in respect of the buildings adjacent to that mansion house that the present question arises. The trustees ask the court to determine whether it is possible for them to spend certain capital moneys upon certain works which are detailed in the schedule to the originating summons. They F are, in the first place, a row of new glasshouses, and, secondly, a range of new buildings which is then described. The range of new buildings comprises garages, a chauffeur's flat, a battery-room, toolshed, boiler-house and workshop. The ground plan of the premises has been adduced in evidence, and from the plan it appears that, at the rear and to the G north of the house, there has been erected this range of buildings, at a distance ranging from some 30 ft. to 50 ft. from the rear of the house. The question is whether it is competent to devote capital moneys to this expenditure, and that depends upon the meaning that I attach to the words which occur in the Settled Land Act, 1925, Sched. III, Part II, H para. 5, namely :

> Structural additions to or alterations in buildings reasonably required whether the buildings are intended to be let or not or are already let :

Before I consider the meaning of those words, it is desirable to look back at Part I of the same schedule and see what the scheme of the Act is. The schedule is in three parts, and the first part is with reference to improvements the cost of which is not liable to be replaced by instalments, including farmhouses, offices and out-buildings in para. 12. Perhaps I may also mention para. 21 :

> reconstruction, enlargement and improvement of any of those works :

Para. 25 contains the words :

> the re-building of the principal mansion house on the settled land.

Also, para. 23 contains the words :

> additions to or alterations in buildings reasonably necessary or proper to enable them to be let . . .

Part II contains improvement towards the cost of which the trustees of the settlement or the court may require repayment to be made by instalments. That part includes houses for bailiffs, gamekeepers and other persons employed on the settled land, or in connection with the management or development thereof. I have not been asked to sanction any expenditure which might be brought under that heading. I have not been asked to sanction any expenditure under para. 3 dealing with the erection of dwelling-houses, or under para. 4 relating to the restoration and rebuilding of buildings. Para. 5, on which the present application is sought to be brought, is :

> Structural additions to or alterations in buildings reasonably required whether the buildings are intended to be let or not or are already let :

There was an argument before me as to whether the works in question could be called structural additions to buildings. It was argued that they were structural additions to buildings which were required. The parties before me consisted of the tenant for life in possession, the tenant for life in remainder, and the ultimate tenant in tail. The case on behalf of the new-born child has been put before the court by counsel for the trustees, whose duty it was to put forward any reason why the expenditure should not fall upon capital moneys. I am satisfied that the case is one in which the works do not fall within the language of the Act. It is not in accordance with the usual meaning of the language to describe as a structural addition that which forms no part of the structure. It seems to me a misuse of language to say that a range of buildings erected 50 ft. or more from this house is to be regarded as a structural addition to that house. I am not impressed with the argument that the purpose for which the new building is to be used should be regarded. That is to say, that, because it serves the purposes of the existing house, it should be regarded as a structural addition to the house. All I can say is that, if the legislature intended any such meaning, language more apt would have been used. In my view, it is incorrect to regard anything as a structural addition unless it can be regarded according to the ordinary use of language as part and parcel of one structure. I do not rule out the possibility that there may be some separation of the addition from the house. I can consider the possi-

bility of a building being so close as to be regarded as part of the same structure, and I do not rule out such cases. But I do find it impossible to say that this building is a structural addition. I have been referred to certain authorities, and in particular I was referred to a case which came before JOYCE, J., in 1903, *Re Blagrave's Settled Estates* (1).
A In that case the question before the court was, first of all, the expenditure upon a certain engine-house, and, secondly, a question in regard to the electric-lighting installation in the mansion house itself. JOYCE, J., decided that expenditure could be allowed for the engine-house. The matter came before him only in chambers, and I have no reasons for his
B decision. He decided that no expenditure could be allowed for the electric-lighting installation. The only decision of the Court of Appeal was that they refused to allow the expenditure upon the electric-lighting apparatus, but two of their Lordships expressed their views with regard to the cost of the engine-house, and I cannot disregard what they said
C upon that. ROMER, L.J., said, at p. 564:

> I am bound to say that I do not quite see how the learned judge in the court below came to allow the expense of the erection of the dynamo-house, seeing, as far as I am aware, that that house was some distance from the mansion-house. It is difficult to see at first sight how it could be said to be an addition to, or alteration in, the mansion-house, or any previously existing buildings; but that point is, fortunately, not before us.

D

COZENS-HARDY, L.J., said, at p. 564:

> I entirely agree. Like ROMER, L.J., I at present entertain great doubt whether the expenditure of capital money in the construction of the dynamo-house, situate as I understand it is, can be brought within any head of the Settled Land Act.

E Having regard to the expression of these views by Lords Justices, I do not feel bound to attach the weight I otherwise should to the decision of JOYCE, J. But, reading what I do, I feel that it is competent for me to come to my own conclusion upon the matter, and to say that, for my part, I am not able to regard as a structural addition that which is a
F substantial distance from the house. I was also referred to *Re Lord Gerard's Settled Estate* (2) and *Re Leveson-Gower's Settled Estate* (3). In neither of these cases was the point I have to determine directly before the court, and I find nothing in the judgments which assists me in coming to a decision. I find nothing to assist me in coming to any con-
G clusion that that forms part of the existing building which is some distance away. In these circumstances, I can only decide that, without prejudice to the question whether the works or any part thereof come within Part III of the Third Schedule to the Settled Land Act, 1925, and that no part of such works are authorised improvements within Part II
H of that Schedule. Costs of all parties will be allowed out of capital moneys.

Solicitors: *Collyer-Bristow & Co.* (for all parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

RYAN *v.* YOUNGS.

[Court of Appeal (Slesser, Scott and Clauson, L.JJ.), **February 8, 1938.**]

Negligence—Highways—Accident due to death of driver of a motor vehicle while driving—Death due to a disease undiscoverable by prior medical examination—Whether employer liable in negligence or nuisance. A

A man, who was employed by the defendant to drive a motor lorry, died while driving the lorry, which ran on and injured the plaintiff. The man, who appeared to be in sound health, in fact suffered from fatty degeneration of the heart, but medical evidence showed that, even had the deceased been medically examined, such examination would not have indicated any liability to sudden collapse. It was contended that B the employer had been negligent in allowing his lorry to go on the road driven by a man suffering from such a latent disability, or that the lorry in such circumstances amounted to a nuisance:—

Held: (i) the employer had not been negligent, as the man appeared to be in good health, and medical examination would not have disclosed any defect. He was not, moreover, under any obligation to have the C driver medically examined.

(ii) there was no defect in the lorry, and it was not a nuisance.

(iii) the accident was due to an act of God.

[**EDITORIAL NOTE.** While it seems plain that there could be no question of negligence in this case, the question of the car being a nuisance upon the highway raises a point of legal interest. The court have applied the decision in *Wing* v. D *London General Omnibus Co.* (1), which was applied in *Parker* v. *London General Omnibus Co.* (1909), 101 L.T. 623 (these cases dealt with omnibuses skidding upon a road in a greasy condition), and have held that there was no ground upon which an action of nuisance could be based in these circumstances.

As to Motors Vehicles as Nuisances upon the Highway, see HALSBURY, Hailsham Edn., Vol. 16, pp. 359, 360, para. 484; and for Cases, see DIGEST, E Vol. 26, pp. 432, 433, Nos. 1512-1514.]

Cases referred to:

(1) *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652; 36 Digest 89, *594*; 78 L.J.K.B. 1063; 101 L.T. 411.

(2) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J. Ex. F 161; 19 L.T. 220; *affg.* S.C. (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

(3) *Hutchins* v. *Maunder* (1920), 37 T.L.R. 72; 36 Digest 64, *413*.

Appeal from a decision of His Honour Judge Drucquer at the Willesden County Court, dated Oct. 26, 1937. G

The facts of the case are fully set out in the judgment.

B. Rogers-Tillstone for the appellant.

Humfrey Edmunds for the respondent.

Rogers-Tillstone: It is submitted that it is negligence to put on the road a car driven by a driver who is suffering from fatty degeneration H of the heart. Anyone who does this places such a person on the road at his own peril. The driver should have been medically examined. The defendant in effect put on to the road an unsuitable vehicle. [Counsel referred to *Wing* v. *London General Omnibus Co.* (1).] The presence of the disease might have been found out, and should have been. There was a duty on the employer to have the driver tested. In *Hutchins* v. *Maunder* (3), it was held that to put on the road a car with a latent defect, even though it was unknown and undiscoverable, is negligent. In that case also, there was no negligent driving, and that case is parallel to this.

Edmunds was not called on.

Slesser, L.J.: This appeal fails. The facts of this case are really not in dispute. A firm, W. Youngs, had in their employment a man who was engaged on Dec. 7, 1936, in driving their lorry in Salisbury Road, Kilburn. The man who was driving the lorry, according to the evidence of the wife of his employer, appeared perfectly well when he went out upon his work that morning. He had never been known to her to be absent from his work, and had made no complaint. He made a joke as he went out at 7.50 a.m., and was apparently in the best of health.

While he was driving this vehicle along the highway at a speed of about twelve miles an hour, the van suddenly mounted the kerb, crushed the plaintiff against the wall, inflicting serious injuries upon her, and bounced back into the road. Mr. Edward Wilcox, who saw the accident, seeing that the van was out of control, ran after it, mounted the van, and found that the driver was lying unconscious over the gear lever. The engine of the van was still running, and the gear was in neutral.

The driver was taken out of the van by the police to the hospital, where it was found that he was dead. The medical evidence is that death probably took place immediately before he was brought into the hospital. Medical evidence was given to the effect that the disease which was disclosed by the post-mortem was due to degeneration of muscles of the heart, and one from which death might ensue without any preliminary symptoms to give warning. The judge says with regard to the medical evidence given:

> The man might drop down dead, having had no previous knowledge that his heart was in a bad state. The slightest exertion might bring about death, such as the sudden pull of the steering-wheel of a motor car.

This action was founded on negligence, or, alternatively, on nuisance. As regards negligence, the judge has come to the view that the injuries sustained by the plaintiff resulted from an inevitable accident, and that there was no negligence on the part of the driver. It is not suggested that there was anything wrong with the vehicle. The only way, as I understand it, in which the case on negligence is put against the employer is not on the principle of *respondeat superior*, that the driver was guilty of any negligence, but that there was negligence in the employer himself, because he had allowed to go out upon the road in charge of one of his vehicles a man who had not been medically inspected, and who carried on his person a latent defect which at any time, if it became overt, might prevent the man from properly controlling the vehicle.

Such a suggestion seems to me to be entirely unfounded. First, there is no reason to draw the conclusion, upon the judgment of the judge, that this man was anything but apparently in a good state of health. The judge says:

> I am satisfied that the driver, Cloke, was in apparent good health prior to the accident, and gave no signs, certainly to Mrs. Youngs, the wife of his employer, who had known him for some years, that he was in anything but the best of health.

The judge does not find in terms that there was any obligation upon the employer to have this man medically examined, but he does find that he was in a perfectly good state of health, which in itself, at any rate, fails to raise any suggestion which an employer could reasonably consider that there was anything in regard to this man's health which called for any unusual precaution.

The second objection to this line of argument is that the medical evidence goes to show that, even had the man been medically examined, there is no reason to suppose that the examination would have indicated that he was likely to collapse that day. The medical evidence which I have mentioned, which the judge cites in his judgment, shows that death may ensue from this disease without any preliminary symptoms to give warning of the presence of the disease. In order to bring negligence home to the employer, there must be some evidence of failure of duty. In my opinion, there was none.

As to the other way in which the case is put, on nuisance, it seems to me that equally no case can be made. The question of the doctrine of nuisance as applied to a motor vehicle was considered by this court in the well-known case of *Wing* v. *London General Omnibus Co.* (1). There Fletcher Moulton, L.J., as he then was, said, at p. 666:

> The mere occurrence of the accident is not evidence of negligence, much less of the more difficult issue of "nuisance," and beyond this there was no relevant evidence of any kind. It was suggested before us that the plaintiff's case was assisted by some admissions made by the defendants' counsel. Neither the note of the learned judge, nor his judgment, contains any record of any such admission. . . . All vehicles have their defects.

Then he points out that no witness was called to prove either that this particular omnibus was, or that motor omnibuses generally were, unmanageable, or dangerous, to such an extent as to constitute a nuisance in the eye of the law, or to call into play the doctrine of *Rylands* v. *Fletcher* (2).

Here, as I have said, there is no suggestion that this vehicle was not fully competent. There is no suggestion that it became incompetent or dangerous otherwise than because of the failure in control of the driver. There is no suggestion that the driver at any material time could reasonably have been expected to be anything but competent. To my mind, this case is what has often been referred to as an act of God. An apparently healthy, apparently competent man, in charge of a competent machine, is suddenly struck down, and that is a matter which nobody can reasonably anticipate. Certainly it is not the case of there being

upon the highway a thing in its nature so dangerous that there is a duty upon the owner to control it, because this vehicle was not in its nature dangerous, when properly driven, and there was no reason to expect that the man would not drive it properly. It is a case of a vehicle, apparently safe—not following the doctrine of *Rylands* v. *Fletcher* (2)
A at all—being placed upon the highway, and being made unsafe through the unforeseen death of the driver, brought about by an act of God. In my opinion, this appeal must be dismissed.

SCOTT, L.J.: I agree.

B CLAUSON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Musson & Co.* (for the appellant); *Hewitt, Woollacott & Chown* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

C

WATLING TRUST, LTD. *v.* BRIFFAULT RANGE CO., LTD.

[COURT OF APPEAL (Slesser, Scott and Clauson, L.JJ.), **February 7, 1938.**]

D

Hire Purchase—Agreement amounting to guarantee between finance company and dealer—Undertaking to collect goods and repurchase should hirer default—Default of hirer—Disappearance of goods—Meaning of "collect."

The plaintiffs were financing a hire-purchase agreement of the defendants, who were the makers of ranges. The hire-purchase agreement
E was entered into between the plaintiffs and the purchaser, and concerned the hire purchase of two ranges. The defendants agreed that, should the plaintiffs for any reason whatsoever have to resume possession of the ranges, they would, upon being called upon to do so, collect them, and further agreed to purchase them at a price not exceeding the amount then outstanding under the hire-purchase agreement. The purchaser, after paying one instalment, absconded and was adjudicated bankrupt.
F He took one of the ranges with him, and it was contended that the defendants were under an obligation to purchase this missing range, and to pay the purchase price thereof, although it could not be found:—

HELD: the agreement by the defendants to purchase the range involved the capacity of the plaintiffs to give delivery of it, and, as the plaintiffs could not state where the missing range was, the defendants
G were under no obligation to pay the amount agreed as the purchase price thereof.

[EDITORIAL NOTE. The arrangement here made between the dealer and the finance company is quite a usual one. Its effect is that the dealer, in a roundabout way perhaps, guarantees the payment by the purchaser of the instalments under the hire-purchase agreement by undertaking to repurchase the goods if seizure
H under the hire-purchase agreement has to be made. As appears from this case, the whole arrangement breaks down if the seizure becomes impossible, and then the finance company are unable to recover from the dealer the balance of the instalments outstanding.

AS TO FINANCING AGREEMENTS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 512, 513, para. 755; and FOR CASES, see DIGEST, Supp., Bailment, Nos. 244a-268a.]

Appeal from a decision of His Honour Judge Snagge at the Westminster County Court, dated Oct. 22, 1937. The facts of the case are fully set out in the judgments.

J. W. Morris, K.C., and *W. Andrew* for the appellants.

D. F. Brundrit for the respondents.

Morris, K.C.: The defendants undertook to collect and to purchase. Those are disjunctive promises. They undertook to do two things. It is submitted that the property in the goods passed immediately the defendants were told to collect them. If there was any difficulty in collecting, that is nothing to do with the plaintiffs. The defendants must find out where this range is. They are under an obligation to collect it.

Brundrit was not called on.

Slesser, L.J.: This is an action for the price of certain goods—enamelled ranges—sold. The action is founded entirely on an alleged sale of these goods by the Watling Trust, Ltd., to the Briffault Range Co., Ltd., and is based on an agreement for sale which is in the following terms:

> The Watling Trust, Ltd., Terminal House, Grosvenor Gardens, S.W.1. In consideration of your entering into the hiring agreement dated Oct. 7, 1936, and made between yourselves and Mr. T. G. Hunter, of 3 and 5, St. James' Street, Manchester 2, in respect of [two enamelled ranges] we agree that should you resume possession of the said articles and/or terminate the said agreement for any reason whatsoever we will on being called upon by you so to do collect it and we hereby agree to purchase it at such price as may be fixed by you provided that such price shall not exceed the whole amount payable by the said Mr. T. G. Hunter under the agreement after deduction of any sums which you may have received from him for rent and depreciation money.

That is dated Oct. 7, 1936. It appears that on Oct. 8, 1936, an agreement was entered into between Watling Trust, Ltd., the plaintiffs in this present action, and Mr. Hunter, that the owners—Watling Trust, Ltd.—should let, and the hirer, Mr. Hunter, should take on hire, certain stoves which are set out in the schedule to the agreement, one No. 3*a* enamelled Briffault range and one 6-ft. enamelled Briffault range. The usual obligations follow, one that he should not part with the possession or custody of the chattels, another to pay a certain hire rent, and so on. There is power given in cl. 3 of the agreement that:

> If the hirer during the hiring shall make default in the punctual payment of any sum due hereunder or fails to observe and perform any of the terms and conditions hereof or shall be adjudicated bankrupt . . . the owners may either (*a*) without prejudice to their claim for arrears of rent or damages for breach of this agreement forthwith without notice terminate the hiring and repossess themselves of and remove the said chattels and for such purpose enter into and upon any premises occupied by the hirer or (*b*) alternatively by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely determine and end this agreement and the hiring thereby constituted and thereupon the hirer shall no longer be in possession of the said chattels with the owners' consent nor shall either party thereafter have any rights hereunder.

Mr. Hunter paid only one instalment in respect of these stoves. On Dec. 14, 1936, Watling Trust, Ltd., were notified by the Assistant

Official Receiver that an order of adjudication had been made against Mr. Hunter on Nov. 27, 1936, and were asked to forward for inspection the original hire-purchase agreement. Thereafter Watling Trust, Ltd., communicated with the Briffault Range Co., indicating—it is not very certain exactly on which condition they proposed to rely—that they had either resumed possession of the articles or terminated the agreement, and calling upon the Briffault Range Co. to purchase them, or it, as provided in the agreement dated Oct. 7, 1936, which I first read, between the Briffault Range Co. and Watling Trust, Ltd.

On Jan. 11, 1937, Watling Trust, Ltd., sent to the representative of the Briffault Co. what is described as a "letter of seizure," to the following effect :

> Re hire-purchase agreement with T. G. Hunter. We hereby authorise bearer to seize the following Briffault ranges : 1 6-ft. heavy pattern Briffault range and 1 No. 3*a* single oven Economique range which is our property and under a hire with option to purchase agreement. . . . The hirer has broken the agreement under cl. 4 and we hereby resume possession.

The representative of the Briffault Range Co. duly went to the premises of Mr. Hunter for the purpose of collecting the two ranges. When he got there, he found that one range had disappeared. The other range he took away.

With regard to the range which he took away, the Briffault Co. do not deny that they did duly collect that range, and they are ready to purchase it, and have in fact purchased it, and there is no dispute with regard to that range. With regard to the range which they could not find and did not take away, however, they deny that they are under any obligation to purchase, and consequently deny that they are liable for the price, being the amount due from Mr. Hunter under the agreement, £43 17*s.* 2*d.*

In my opinion, on a proper construction of the agreement of Oct. 7, 1936, between the plaintiffs and the defendants, the defendants were perfectly right in the view which they took. The agreement was that if the Watling Trust, Ltd., should resume possession of the article or terminate the agreement,

> we will on being called upon by you so to do collect it and we hereby agree to purchase it.

I am willing to assume for the purpose of this case—though the judge seems to have had some doubt on the matter—that the Watling Trust, Ltd., did terminate their agreement with Mr. Hunter, and were, therefore, in a position to call upon the defendants, the Briffault Range Co., to collect the ranges. In my opinion, however, the right to call upon them to collect the ranges involved, if it were to be efficacious, an obligation that the place at which the ranges could be collected should be specified to the Briffault Co. A mere intimation calling upon them to collect them, wherever they might be, was not sufficient. I think that this particular contract must be read in this way : that the Briffault

Co. agreed to collect the ranges at such a place as might be specified in the requirement of collection.

Mr. Morris is constrained to admit that, as he does not know where the range is, or what Mr. Hunter has done with it, he did not and could not at any time tell the defendants where to collect the range. Therefore, the first condition of the obligation to purchase seems to me to have been lacking, because there was no power to call on them to collect at all.

Then, secondly, there is the agreement to purchase it in this letter—I think the letter of collection is the letter indicated. I take that to mean to purchase that which by one means or another the vendors are able to deliver, the goods which have to be purchased, so that there is something to be purchased. This is, in my opinion, an ordinary contract of sale, and, as the plaintiffs are unable to give possession either by delivery or by enabling delivery to take place on their premises, or by indicating delivery from some third person, as they are in no way able to give delivery of these goods, there is no obligation to pay for them, and that is the end of this case.

The case has been confused, not by Mr. Morris, but by the correspondence and the documents themselves, by an assumption, so often made in this class of case, that, because the consideration for entering into the agreement was the hiring agreement, and because there is a reference to Mr. Hunter as the hirer, therefore all the terms of the hiring agreement between the Watling Trust, Ltd., and Mr. Hunter are to be imputed to be within the knowledge of the Briffault Co. In my opinion, beyond the fact that the hiring agreement being entered into is mentioned as a consideration, and beyond the fact that there is a reference to the resumption of possession of the articles by the Watling Trust, Ltd., on the termination of the agreement, the Briffault Range Co. have nothing whatever to do with the hiring agreement at all. All they have undertaken to do is, in certain circumstances, to purchase certain stoves. Those circumstances involved, as I have said, the capacity of the vendors, the Watling Trust, Ltd., to sell them those things which they had agreed to purchase, and one method by which delivery is to be effected is that contemplated—namely, the method of collection by the Briffault Co. As they can neither give them an opportunity of collection nor sell the goods whose existence they are not even able to assert, it follows that the action is ill-founded, and that the claim for the price of the goods, delivery of which they are quite unable now or hereafter to give, fails.

Scott, L.J.: I agree. I would like to point out that this is another instance of what so often appears to be the position in connection with this widespread business of hire-purchase agreements. The parties, for some reason best known to themselves, will not put on paper in simple terms the reality of the bargain they want to make, but pretend that it is something quite different. In this particular case, what the

Watling Trust, Ltd., wanted was a simple contract by the Briffault Range Co. giving the Watling Trust, Ltd., an indemnity against loss under the hiring agreement they made with Mr. Hunter. That was really the relief that the Watling Trust, Ltd., wanted. Instead of making that simple agreement, they entered into this very peculiar agreement which SLESSER, L.J., has read, pretending that, in the event of default by the hirer, the Briffault Co. will carry out a contract of purchase. Under that contract of purchase, which was in fact made here—a most inconvenient method of enabling the Watling Trust, Ltd., to get what they wanted—the Watling Trust, Ltd., could not sue for the price of either of these two ranges unless they were in a position to give delivery. They have not been in a position to give delivery, and that is the end of their action for the price, and it is the whole of it. It shows how inconvenient it is to attempt to carry out one object by a method wholly inappropriate to achieve that object. It would be very much better for the parties that the reality of the transaction should appear in the documents.

What happened here obviously was that the hirer proved dishonest, and made away with one of the articles that he was hiring, and thereupon the Watling Trust, Ltd., wanted to get damages for his fraud out of the Briffault Co. by way of an indemnity. They have not expressed that plan in the agreement that they made, and, consequently, the appeal must be dismissed. I think that the judge came to a correct conclusion upon the interpretation of the contract sued upon.

CLAUSON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Hyde, Mahon & Pascall* (for the appellants); *Calcott Pryce & Co.* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

R. *v.* BRIGGS.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Branson and Macnaghten, JJ.), **February 7, 1938.**]

Criminal Law—Autrefois convict—Committal for trial after plea of guilty—Accused not asked whether he elected to be dealt with summarily—Criminal Justice Act, 1925 (*c.* 86), *s.* 24.

The appellant was charged before the magistrates with larceny. The evidence for the prosecution was given, and, at the conclusion of that evidence, the chairman of the bench asked him whether he pleaded guilty or not guilty. The appellant pleaded guilty, under the impression, as he alleged upon the appeal, that he was to be dealt with there and then. The chairman at no time asked him whether or not he consented to have his case dealt with summarily, and the procedure prescribed by the Criminal Justice Act, 1925, s. 24, was not followed. Upon the appellant pleading guilty, he was at once committed for trial at the assizes. He contended that a plea of *autrefois convict* would have been maintainable in answer to the indictment at the assizes:—

HELD: the cases of *R.* v. *Sheridan* (1) and *R.* v. *Grant* (2) were distinguishable from the present case, in that in those cases the accused had been asked if he consented to his case being dealt with summarily. Where the procedure under the Criminal Justice Act, 1925, s. 24, is not followed, no plea of *autrefois convict* can be maintained if the accused, after a plea of guilty, is committed for trial.

[**EDITORIAL NOTE.** The principle laid down in the cases of *R.* v. *Sheridan* (1) and *R.* v. *Grant* (2) is restricted to cases where the accused, being charged with an indictable offence, elects to be treated summarily. If the prisoner is not asked whether or not he consents to his case being dealt with summarily, it is immaterial that he has pleaded guilty before the magistrates, and the plea of *autrefois convict* is not available to him when, after having been committed for trial, he is indicted at quarter sessions or at assizes. A

AS TO PLEA OF *Autrefois Convict*, see HALSBURY, Hailsham Edn., Vol. 9, pp. 152, 153, para. 212; and FOR CASES, see DIGEST, Vol. 14, pp. 336-349, Nos. 3550-3653.] B

Cases referred to:

(1) *R.* v. *Sheridan*, [1936] 2 All E.R. 883; Digest Supp.; 155 L.T. 207.
(2) *R.* v. *Grant*, [1936] 2 All E.R. 1156; Digest Supp.; 155 L.T. 209.

C

APPLICATION for an extension of time in which to apply for leave to appeal against conviction, the appellant having already been refused leave to appeal against sentence.

The Criminal Justice Act, 1925, s. 24 (1), (2), is as follows:

D

> (1) Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence, being one of the offences specified in the Second Schedule to this Act, the court, if it thinks it expedient so to do, having regard to any representation made in presence of the accused by or on behalf of the prosecutor, the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment which a court of summary jurisdiction has power to inflict), and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may, subject to the provisions of this section, deal summarily with the offence, and, if the accused pleads guilty to, or is found guilty of, the offence charged, may sentence him to be imprisoned for any term not exceeding six months or to a fine not exceeding £100 or to both such imprisonment and fine. . . . E
>
> (2) If a court of summary jurisdiction at any time during the hearing of a charge for such an indictable offence as aforesaid against a person who is an adult becomes satisfied that it is expedient to deal with the case summarily, the court shall thereupon, for the purpose of proceedings under this section, cause the charge to be reduced into writing and read to the accused and shall then address to him a question to the following effect, "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" with a statement, if the court thinks such a statement desirable for his information, of the meaning of the case being dealt with summarily, and of the assizes or quarter sessions, as the case may be, at which he will be tried, if tried by a jury, and if the accused consents to be dealt with summarily, shall forthwith ask him the following question, "Do you plead guilty or not guilty?" F G

Neither the appellant nor the Crown was represented by counsel.

H

MACNAGHTEN, J. [delivering the judgment of the court]: At the Durham assizes on Nov. 9, 1935, the appellant, James Henry Briggs, pleaded guilty to larceny, and he was found by the jury to be a habitual criminal. He was sentenced to 3 years' penal servitude, and 5 years' preventive detention. In May, 1936, five months out of time, he applied to this court for an extension of time in which to appeal against sentence. That application was refused on May 25, 1936. In July, 1937, he became aware of the decisions of this court in the cases of *R.* v. *Sheridan* (1) and *R.* v. *Grant* (2), and, thinking that those decisions had some application to his own case, he petitioned the Home Secretary that his case might be reviewed. He now applies again to this court, by notice dated Jan. 5, 1938, for an extension of time in which to appeal against his conviction for larceny and the finding that he was a habitual criminal, on the ground that those decisions show that, in view of what took place before the court of summary jurisdiction, which committed him for trial at the assizes, a plea of *autrefois convict* could have been maintained in answer to the indictment for larceny.

The decisions of this court in the cases of *Sheridan* (1) and *Grant* (2) have, however, no application to the facts of the present case. In those cases the procedure prescribed by the Criminal Justice Act, 1925, s. 24, in cases where a court of summary jurisdiction decides to deal summarily with persons charged with an indictable offence, had been followed. The accused had been asked if he consented to his case being dealt with summarily, and had given his consent, and the court had then proceeded to adjudicate. Sheridan was convicted on evidence, Grant on his own confession. In those cases, the court of summary jurisdiction, after thus adjudicating, refrained from passing sentence, and committed the accused for trial on indictment at the next court of quarter sessions. In those circumstances, this court held that a plea of *autrefois convict* would have been maintainable in answer to the indictments at quarter sessions.

In the present case, it is not suggested that the procedure prescribed by the statute was followed. The appellant was not asked if he consented, and did not consent, to his case being dealt with summarily. He says that the chairman of the bench of magistrates, at the conclusion of the evidence for the prosecution, asked him whether he pleaded guilty or not guilty, and that he, " under the impression that he was to be dealt with there and then," pleaded guilty, and that thereupon the magistrates, on the application for the solicitor for the prosecution, committed him for trial at the Durham assizes. The magistrates did not accept the appellant's plea and adjudicate on his case, and no plea of *autrefois convict* could have been maintained by him in answer to the indictment for larceny at the assizes.

This application for an extension of time for leave to appeal against conviction must, therefore, be dismissed. If it were granted, the appellant could not gain anything by it.

Application dismissed.

Solicitor: *Registrar of the Court of Criminal Appeal.*

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

J. F. ADAIR & CO., LTD. *v.* BIRNBAUM.

[King's Bench Division (Goddard, J.), **January 27, 1938.]**

Sale of Goods—Failure to deliver—Insolvency of seller—Clause providing for insolvency—Notice condition precedent—Clause providing for default—Voluntary default—General Produce Brokers' Association contract.

The respondent purchased from the claimants a large quantity of pepper, the contract being in the form used by the General Produce Brokers' Association. It provided that, upon the seller failing to fulfil the contract, the buyer should close by invoicing back the contract to the seller at once, at a price and weight fixed by arbitration, not being less than 2 per cent. nor more than 10 per cent. over the market value on the day of default. The difference between the contract price and the invoicing back price, which was to be paid in cash within 7 days, was to be a final settlement between the parties. Another clause provided for insolvency before the maturity of the contract, but this clause was subject to the insolvent receiving 48 hours' notice that the other party elected to act upon it. The sellers, before the time of shipment arrived, suspended payment. The general committee of the General Produce Brokers' Association purported to close the contract, but the respondent did not accept this position, and refused to pay any sum to the claimants :—

Held : (i) as no notice was given under the insolvency clause, the case had to be treated as one where the seller was in default.

(ii) a default due to the insolvency of the seller is not a voluntary default.

(iii) the first clause referred to above made express provision for the seller's default, and it could not be objected that the seller could not avail himself of this clause when he himself was in default.

[EDITORIAL NOTE. The clause here in question has been before the courts on several occasions, but not in a case where the seller has become insolvent. It would appear that the position arising upon insolvency is intended to be covered by the second clause above referred to, but it is held that that clause is not brought into operation unless the notice which it provides for is either given or waived. In dealing with the first clause, the Court of Appeal and the Divisional Court have both spoken of voluntary default by the seller. The exact meaning of the term " voluntary default " has yet to be decided, but the present case carries the matter one step further, since it is held that the insolvency of the seller does not create a voluntary default on his part.

As to the Exclusion of Market Price Rule, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 271, 272, para. 472 ; and for Cases, see DIGEST, Vol. 39, pp. 671, 672, Nos. 2582-2587.]

Cases referred to :

(1) *Lang* v. *Crude Rubber Washing Co.* (1911), Unreported.

(2) *Re Bourgeois (Fl.) & Wilson, Holgate & Co.* (1920), 25 Com. Cas. 260 ; 39 Digest 661, *2520*.

(3) *Roth, Schmidt & Co.* v. *Nagase (D.) & Co., Ltd.* (1920), 2 Lloyd, L.R. 36 ; 39 Digest 587, *1886*.

(4) *Lancaster* v. *Turner (J. F.) & Co., Ltd.*, [1924] 2 K.B. 222 ; 39 Digest 672, *2585* ; 93 L.J.K.B. 1024 ; 131 L.T. 525.

(5) *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France*, [1919] A.C. 1 ; 39 Digest 667, *2560* ; 87 L.J.K.B. 746 ; 118 L.T. 731 ; *affg.* S.C., [1917] 2 K.B. 717.

Special Case stated by an arbitrator appointed under the rules of the General Produce Brokers' Association in an arbitration arising out of the sale by J. F. Adair & Co., Ltd., to David Birnbaum of 45 tons of pepper.

The facts and arguments are fully set out in the judgment.

Sir Robert Aske, K.C., and *H. G. Robertson* for the claimants.

D. N. Pritt, K.C., and *W. Lennox McNair* for the respondent.

GODDARD, J.: The point which falls for decision is one of construction, which has, in one form or another, been before the courts on numerous occasions. I have had an opportunity of considering the cases, and I have come to the conclusion that the arbitrator was right here.

The matter arises in this way. In the contract of sale there is this clause 9 (*f*), which says:

> Whenever it may be admitted by the seller, or decided by arbitration, that the seller has failed to fulfil the terms of the contract the buyer shall "close" by invoicing back the contract to the seller at once, at a price and weight to be fixed by arbitration which price shall not be less than 2 per cent., and not more than 10 per cent, over the estimated market value of the shipment contracted for on the day on which the default occurs, the difference between contract price and invoicing back price to be paid in cash within seven days; and this payment shall constitute a final and complete settlement of all claims by either party in respect of the said contract.

Clause 11, all of which is material, says:

> If before the maturity of any contract either party liable on the face thereof shall suspend payment, or be a defaulter, or issue a notice convening a meeting of his creditors, or become bankrupt or insolvent, such contract shall thereupon be closed (forty-eight hours' notice having been previously given to him) upon terms to be fixed by arbitration in accordance with r. 7 of the General Produce Brokers' Association of London.

There is also, on the face of the contract, a general clause that any differences on the contract shall be referred to arbitration.

What happened, as shown on the award, was that the sellers, before the time of shipment arrived, suspended payment. In fact they practically went into liquidation, and they never delivered at all. The general committee of the Produce Brokers' Association purported to close the contracts. It is admitted now that they had no power to do that, but they did it, supposing, I imagine, that everybody who had dealings with Adair & Co., Ltd., wanted the contract closed, and they purported to close at 4*d*., the amount which was afterwards found by the arbitrator to be the market price, and, as that would have resulted in Birnbaum having to make a payment, he, of course, did not accept it. Then this money was demanded, and the parties went to arbitration.

The first point which was made by Mr. Pritt in argument was that cl. 9 (*f*), which I read first, does not apply at all, and that cl. 11 is the governing clause, and he supports the argument by saying that the parties appointed their arbitrator under cl. 11, which, in fact, by the correspondence they appear to have done. Sir Robert Aske points out that cl. 11 applies only to something happening before the maturity of the contract and not to the default, because the default cannot occur until the time for performance arises. Clause 11 applies to something before the time of performance has arrived. The buyer then has the right to give 48 hours' notice, which, of course, could be waived, as apparently it was waived in this case, because the sellers were willing that that clause should be put into operation. If, as I say, he gives the requisite notice, or if it is waived, the buyer can claim that his contract is closed. If he does, and if the parties do not agree to the terms upon which it is to be closed, it can definitely be fixed by arbitration. I prefer not to express any opinion as to whether the terms which the arbitrator can fix could be in substance the same as the terms which can be fixed under cl. 9 (*f*), that is to say, the innocent buyer may have to make a payment or not. It is time enough to decide that question when it arises, but it does not arise here. In my judgment, Sir Robert Aske is right on his first point that cl. 11 really does not apply at all, because, as I have said, there was no power given in the contract to the Produce Brokers' Association to close the contracts of their own volition. The buyer could have closed the contract if he had liked by giving 48 hours' notice, but he did not. Therefore, I think that the rights of the parties fall to be determined by what happened when default was made, or rather fall to be determined by the provisions of the contract which dealt with default being made. Default having been made, the provisions of cl. 9 (*f*) come into operation. Of course, at first sight it is startling, and indeed it may be said to be startling not only at first sight, but on consideration, that, where a seller makes default on a falling market, the buyer should have to pay him money at all, but the parties are at liberty to make any bargain they like, and I imagine that this clause is put in to discourage a buyer from taking captious objections, and it may make it difficult or impossible for the seller to declare default. However that may be, one sees that it is made clear in the judgment of Bankes, J., in *Lang* v. *Crude Rubber Washing Co.* (1) that the buyer has to pay, if he buys against the contract, that which he would have to pay under his contract. A portion of this payment he is bound to pay to the seller, although the seller has made default. The arbitrator has power, so to speak, to impose a penalty of from 2 per cent. to 10 per cent. It is no doubt crude, and in a way is a curious contract, and may have curious results, and a result which is different from the result at common law, but it is quite impossible for me, I think, to do anything else than to follow the judgments in *Lang* v. *Crude Rubber Washing Co.* (1), because that case has been before the Court of Appeal and has been considered by the Court of Appeal on more than one occasion. It was considered in *Re Fl. Bourgeois & Wilson, Holgate & Co.* (2), and it was cited in other cases. *Roth, Schmidt & Co.* v. *Nagase (D.) & Co., Ltd.* (3) was cited, in which that case had been considered, and, although those cases were distinguished and differentiated from *Lang's* case (1), there is no question that the court took the view that *Lang's* case (1) was correctly decided, as also they did in the case of *Lancaster* v. *Turner (J. F.) & Co., Ltd.* (4).

Mr. Pritt has made two points on that. He said: " Even if I am bound by those cases, this one is distinguishable, because the Court of Appeal and the Divisional Court left open the question as to what was to be done in the case of a voluntary default, as it is called. That is to say, as I understand it, if a seller turns round and simply says, 'I can deliver, but I will not deliver,' is he then to be allowed to come forward and to say to the buyer under this clause: 'Nevertheless you have got to pay me although I have not delivered'?" The Court of Appeal and the Divisional Court said that they would reserve that point until it arose. Therefore, unless I think it arises, I do not think that it would be respectful for me to express any opinion about it at all, or that it is desirable that I should, because in this case I do not think that it arises, and I do not think that it arises for a variety of reasons. Perhaps the first and simplest reason is that it is not submitted or raised in the case and there is no material in the case stated by which I can say whether or not it is a voluntary default, except this. The default arose because the sellers became insolvent, and I do not think for a moment that a failure by an insolvent company to deliver (presumably because they could not buy) is a voluntary default within the meaning of the Court of Appeal and the Divisional Court using that expression in the other cases. I think that probably, considering the case, it would arise where, for the sake of getting some money, the seller took advantage of this clause on a falling market, and said " I will not deliver, because, by the curious wording of this clause, if I do not deliver, I can get some money out of you." I do not think that that arises here, and I think that Sir Robert Aske is entitled to take the point—which he does take—that the point does not seem to have been raised in the pleadings, and, therefore, cannot be said to have been before the arbitrator.

One other point has to be mentioned. Mr. Pritt argued, and argued with some force, that, since the decision of the House of Lords in the case of *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France* (5), I ought not to regard these cases to which I have referred as any longer the law, because he says that that case shows that a party is not entitled to make use of this class of clause where he himself is in default. That was a case where there was a provision that:

> In case the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European war, 18 months from the date agreed by contract for completion, " thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them."

That was the contract, and the House of Lords held in that case that the builders were entitled to treat the contract as null and void, because it was not their fault that they had not been able to complete the vessel. They said that, if it had been their fault that they had not been able to complete the vessel, they would not have been entitled to treat the contract as void. But in this case I think this clause means—and indeed I think that the courts whose decisions are binding upon me take the view—that express provision is made here for the seller's default. The clause comes into force only on the seller's default. Of course, it may still be said that it was not intended that a seller in default should take advantage of the clause; that it was intended only that a buyer should take advantage of the clause on the seller making default. So to hold would be to disagree with the authorities which I have already cited. The result in *Lang* v. *Crude Rubber Washing Co.* (1) was that, although the seller was in default there, the buyer had to pay the seller. In these circumstances, I cannot hold that the *New Zealand* case (5) in any way affects the point which I have to decide, and I therefore cannot give effect to that submission by Mr. Pritt.

Question submitted by the arbitrator answered in favour of the sellers.

Solicitors: *Simmons & Simmons* (for the claimants); *Rehder & Higgs* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

CASHIN *v.* CASHIN.

[Privy Council (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, and Lord Maugham), **December 3, 6, 7, 1937, January 13, 1938.**]

Privy Council—Newfoundland—Family arrangement—Essential requirements—Generosity of one party—Fiduciary relationship.

A testator, more than two years prior to his death, transferred to his wife a large sum in bearer bonds by manual delivery. By his will he bequeathed, *inter alia*, certain legacies to his three sons, one of whom was the respondent, and the residue of his estate to his wife for life, and after her death to his three sons in equal shares. He appointed his wife an executrix of his will. The estate was insufficient to pay the legacies in full. Subsequently endeavours were made on behalf of the Minister of Finance to obtain payment of death duties on the bonds, on the footing that they formed part of the estate. This contention was based on the fact that the testator had collected and used the interest on the bonds during his lifetime and after the transfer had been made. Ultimately payment of the amount claimed was made by the testator's widow, without prejudice to her ownership of the bonds. Later a deed was executed by her and her three sons, under which she undertook to provide a sum sufficient to pay the additional estate duty (which she had already done) and all pecuniary legacies in full, her sons, on their part, relinquishing any claim against her in relation to the bonds. The deed did not purport to be, nor was it in substance, an agreement by the executors with the beneficiaries. The provisions of the deed were at once carried out. Three years afterwards, the respondent instituted proceedings to set aside the deed, on the ground that it constituted a release of the bonds to a person in a fiduciary position, or, alternatively, that, if intended to take effect as a family arrangement, it was an agreement *uberrimæ fidei*, casting upon the testator's executors a duty of full disclosure. It was alleged that the executors had failed to disclose that the bonds had not been the subject of a complete gift by the testator to his wife, and that therefore at his death they formed part of his estate:—

Held: the deed was a release by the three sons of a doubtful claim against the mother, and it was a mistake to regard her as a trustee of the bonds for the beneficiaries, even if the gift had not been completed. Her position as an executrix gave her no advantage in coming to an agreement with her sons, nor did the deed involve a family arrangement tainted with undue influence. The respondent was a merchant of such knowledge, experience and ability that there was no inequality in relation to capacity to contract as between him and his mother, and, as there was neither concealment of material facts nor any want of fairness in the transaction embodied in the deed, it could not be set aside.

[**EDITORIAL NOTE.** In dealing with the administration of a deceased's estate, it is often desired, with the consent of all parties to substitute a different division of the property from that made by the testator. The present judgment is very helpful in that it shows that even where one or more of the parties to the necessary family arrangement are in a fiduciary position, the validity of the arrangement cannot be questioned merely on the ground that one of the parties has acted very generously.

AS TO THE ESSENTIALS OF A FAMILY ARRANGEMENT, see HALSBURY, Hailsham Edn., Vol. 15, p. 13, para. 15; and FOR CASES, see DIGEST, Vol. 24, pp. 954, 955, Nos. 81-86.]

Cases referred to:

(1) *Dummer* v. *Pitcher, Pitcher* v. *Dummer* (1833), Coop. *temp*. Brough. 257; 27 Digest 163, *1325*; 2 My. & K. 262.

(2) *Smith* v. *Kay* (1859), 7 H.L. Cas. 750; 35 Digest 19, *109*; 30 L.J.Ch. 45; *affg*. S.C. (1856), 21 Beav. 522.

(3) *Gordon* v. *Gordon* (1819), 3 Swan. 400; 35 Digest 113, *176*.

(4) *Savery* v. *King* (1856), 5 H.L. Cas. 627; 35 Digest 78, *758*; 25 L.J.Ch. 482; 27 L.T.O.S. 145; *varying* S.C. (1853), 1 Sm. & G. 271.

(5) *Fane* v. *Fane* (1875), L.R. 20 Eq. 698; 24 Digest 957, *113*.

(6) *Strong* v. *Bird* (1874), L.R. 18 Eq. 315; 25 Digest 538, *268*; 43 L.J.Ch. 814; 30 L.T. 745.

(7) *Re Stewart, Stewart* v. *McLaughlin*, [1908] 2 Ch. 251; 25 Digest 539, *274*; 77 L.J.Ch. 525; 99 L.T. 106.

(8) *Re Pink, Pink* v. *Pink*, [1912] 2 Ch. 528; 25 Digest 539, *270*; 81 L.J.Ch. 753; 107 L.T. 241.

(9) *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57; 25 Digest 508, *47*; 59 L.J.Q.B. 377; 63 L.T. 153.

(10) *Bashall* v. *Bashall* (1894), 11 T.L.R. 152; 25 Digest 507, *44a*.

(11) *Re Wasserberg, Union of London & Smiths Bank, Ltd.* v. *Wasserberg*, [1915] 1 Ch. 195; 25 Digest 553, *378*; 84 L.J.Ch. 214; 112 L.T. 242.

(12) *Re Craven's Estate, Lloyds Bank, Ltd.* v. *Cockburn* (*No.* 1) [1937] Ch. 423; [1937] 3 All E.R. 33; Digest Supp.; 106 L.J.K.B. 308; 157 L.T. 283.

APPEAL from a majority judgment of the full bench of the Supreme Court of Newfoundland (SIR WILLIAM H. HORWOOD, C.J., and HIGGINS, J., KENT, J., dissenting), dated Jan. 8, 1937, dismissing an appeal from a judgment of SIR WILLIAM H. HORWOOD, C.J., dated July 21, 1936, whereby a deed dated Sept. 8, 1927, and made between the parties to this appeal was ordered to be set aside. The facts of the case are set out in the judgment of their Lordships delivered by LORD MAUGHAM.

Sir Walter Monckton, K.C., *H. A. Winter, K.C.*, and *B. J. Mackenna* for the appellants.

Monckton, K.C., opened the appeal, but was not called upon to argue.

R. O. Wilberforce, for the respondent: The agreement dated Sept. 8, 1927, constituted a release or a gift of the bonds to a person in a fiduciary capacity based upon statements therein which did not accord with the facts. The appellant, Gertrude C. Cashin, as executrix of Sir Michael Cashin, stood in a fiduciary position towards the beneficiaries under his will, which prevented her from accepting a gift from, or making a bargain with, them without ensuring that they fully appreciated what they were doing and that they intended to do it. The respondent in executing the deed was at a disadvantage, inasmuch as the facts were never properly before him so as to enable him to form any judgment upon them. The agreement dated Sept. 8, 1927, rested upon a wholly false basis, because the recitals therein did not accord with the facts. If it was intended to take effect as a family arrangement, it was an agreement *uberrimæ fidei*, casting upon the executors of Sir Michael Cashin a duty, which they failed to fulfil, to make a complete disclosure of all material facts. [Counsel referred to *Cochrane* v. *Moore* (9), *Bashall* v. *Bashall* (10), *Re Wasserberg, Union of London & Smiths Bank, Ltd.* v. *Wasserberg* (11), *Re Craven's Estate, Lloyds Bank, Ltd.* v. *Cockburn* (*No.* 1) (12), *Re Stewart, Stewart* v. *McLaughlin* (7), *Strong* v. *Bird* (6), and *Re Pink, Pink* v. *Pink* (8). Counsel also referred to POLLOCK AND WRIGHT ON POSSESSION, 1888 Edn., p. 60.]

LORD MAUGHAM: The agreement under seal, dated Sept. 8, 1927 (which will be referred to as "the deed"), related to the estate of Sir Michael P. Cashin who died on Aug. 30, 1926. He left surviving him his wife, the appellant Gertrude C. Cashin (Lady Cashin), and four adult children, the appellants Lawrence V. Cashin, and Martin Cashin, the respondent Peter J. Cashin, and a married daughter, Mrs. Mary Fox. Sir Michael Cashin had made his last will on Nov. 15, 1925. By it, the appellants Lady Cashin and Lawrence Cashin were appointed to be the executors. He bequeathed to each of his sons $40,000, and, after some small charitable and other legacies, he bequeathed the residue of his estate to Lady Cashin for life, and after her death to his three sons in equal shares. The two executors proved the will on Sept. 20, 1926. According to the inventory and valuation of the property filed with the petition for letters of probate, the total value of the estate was $99,496. The sum of $4,702, being the duty payable on this amount under the (Newfoundland) Death Duties Act, 1914 to 1916, was promptly paid. On this footing, the estate was insufficient to pay the legacies in full, and in fact the three sons would have received roughly only $20,000 apiece, and there would have been no residue.

Sir Michael in 1924 had made, or at least had attempted to make, some large gifts to Lady Cashin. In particular, he had, in circumstances which were investigated at the trial, transferred to her $300,000 Dominion of Canada 5 per cent. 1943 bearer bonds. That transaction took place on May 8, 1924. He also on the same day had given to her $40,000 which had been standing to his account at the Montreal Trust Company, St. John's. On May 21, 1924, he gave to her a further sum of $20,000 which had been standing to his account at the Bank of Montreal, St. John's. No attempt has been made by any person to impeach either of these latter gifts, but the respondent alleged in the action that the gift of the bonds was imperfect, and therefore void, and it is necessary to state certain undisputed facts as to this alleged gift.

Sir Michael had purchased the bonds through agents in Canada in Mar., 1924, and they were forwarded to him at the Bank of Montreal, St. John's. After the arrival of the bonds, Sir Michael, with his son Mr. Lawrence Cashin, went to the Bank of Montreal, took possession of the bonds, and placed them in a safe-deposit box rented by him in the vaults of the Royal Bank of Canada, and in which he kept his personal papers and securities. Shortly afterwards, Sir Michael, wishing to present these bonds to his wife as a gift, consulted his son-in-law, Mr. Cyril J. Fox, K.C., a lawyer of experience practising in St. John's, as to how he could effect the gift. The interview with Mr. Fox took place in Sir Michael's bedroom at his home, in the presence of Lady Cashin and of his son Mr. Lawrence Cashin. Sir Michael told Mr. Fox of his intention to give the bonds to his wife, and asked him what he should do to carry out his intention. Mr. Fox told him that he might do so either by deed or by manual delivery of the bonds themselves to Lady Cashin. Accordingly, on or about May 8, 1924, shortly after his conversation with Mr. Fox, Sir Michael, accompanied by his son Mr. Lawrence Cashin, went to the Royal Bank of Canada for the purpose of transferring the bonds to Lady Cashin. At the bank, he was told by the officials that it was necessary for Lady Cashin to be present to effect the gift and sign the lease of the deposit-box to be issued to her for the safe keeping of the bonds in place of that previously held by Sir Michael. Mr. L. V. Cashin then went home for Lady Cashin, and brought her to the bank for this purpose. Sir Michael surrendered his lease of the deposit-box to the bank, and the bank issued a fresh lease of the deposit-box to Lady Cashin. She then executed a printed form on the back of the lease, the substance of which (the original has long since been destroyed) was in these terms:

> I hereby designate "Sir Michael Cashin and Mr. Lawrence Cashin" as my deputies to have access to and control of the contents of safe-deposit box [giving the number] now rented by me in the vaults of the Royal Bank of Canada . . . until this authority is revoked in writing to the bank.

It should be added that at this date Mr. Lawrence Cashin was living at home with his father and mother.

If the matter had rested upon these undisputed facts, it seems to their Lordships that no question as to the validity of the gift of the bonds could have arisen, but Sir Michael, after his return to Newfoundland from a visit to England on account of his health, in the summer of 1924, and until his death some three years later, used his power under the proxy form above set out to collect and cash the coupons attached to the bonds. This circumstance, in a case where—as here—husband

and wife are living in amity together, is capable of an easy explanation,
but it is to be observed that in this case no explanation of it was given
at the trial. Two other facts may be mentioned as possibly having some
bearing on the question of the completeness of the gift. Sir Michael
continued to pay income tax on the bonds. This would be natural
enough if there were evidence that he was collecting the coupons with A
Lady Cashin's consent. The other circumstance is the magnitude of
the bequests in his will. This has always been regarded as of very
slight importance as an indication to negative a previous gift or advancement:
Dummer v. *Pitcher* (1), at p. 276. Moreover, the will read as
a whole contains some indication that he did not consider the bonds to B
be his. After his conversation with his son-in-law and the transaction
at the Royal Bank of Canada on May 8, 1924, it does not seem an
unlikely conjecture that, if he had desired the bonds which he had
placed in the possession of his wife to pass under his will, he would
have mentioned them in terms. A will speaks from the death of a C
testator. Sir Michael may have expected, or at least hoped, when he
made his will, to gain large sums of money before his death. In fact,
he gave up his position and his interest in the family business of Cashin
& Co. on Dec. 1, 1925, and died suddenly some nine months later.

As has been stated, death duties on the estate had been paid on the D
footing that the bonds had been given to Lady Cashin over two years
before the death, the period before death necessary to enable the executors
to escape the payment of duties in respect of a gift under the law of
Newfoundland. Some six months later, endeavours were made on
behalf of the Minister of Finance to obtain payment of death duties on E
the bonds, on the footing that they formed part of the estate, the contention
being based on the fact that Sir Michael had collected and used
the interest on the bonds during his lifetime. Affidavits by Mr. Lawrence
Cashin and Lady Cashin to establish the gift did not succeed in getting
the revenue authorities to abandon the claim. The respondent Mr. F
Peter Cashin was then made acquainted with the contention put forward
by the government, and he and Mr. Lawrence Cashin interviewed Sir
John Crosbie, the Minister of Finance, who explained to them the
government's contention. They were unable to persuade him to abandon
it. In Aug., 1927, a formal claim was made for payment of death G
duties in respect of the bonds. When this claim was received, Mr.
Lawrence Cashin again consulted with the respondent, who, it should
be mentioned, was at this time his partner, as to the course that should
be pursued. They went to see first Mr. Wood, K.C., and then another
lawyer, Mr. Howley, as to whether or not the estate was liable. According H
to the respondent, the advice of these gentlemen was not encouraging.
Ultimately, in order to avoid publicity and the necessity of Lady Cashin
appearing in court, it was decided that the payment should be made.

On Aug. 24, 1927, a cheque for $25,257.56 was forwarded to the
Minister of Finance by the executors, in settlement of the claim for

additional death duties. The letter accompanying the cheque contained the following passage:

> We beg to enclose certified cheque for $25,257.56 amount of said corrected assessment, but in doing so we desire it to be distinctly understood, that we do not depart from our contention, that the Canadian bonds were at the time of Sir Michael's death the property of Lady Cashin.
>
> We are advised, however, that principally owing to the fact, that the interest on these bonds was placed to the credit of Sir Michael Cashin, that the bonds although the property of Lady Cashin, are technically liable for the death duties.
>
> We therefore make this payment without prejudice to the ownership of Lady Cashin.

A few days later the deed, which is the subject of the appeal, and which had been discussed for some time previously, was executed by the four persons concerned—namely, Lady Cashin and her three sons. It undoubtedly binds the respondent, unless it can be established that there is some sufficient ground in equity for setting it aside. There is no suggestion of fraudulent representation raised by the pleadings, and no allegation which would support a plea of *non est factum.* The deed (omitting attestation and signatures) was in these terms:

> This indenture made Sept. 8, 1927, between Gertrude C. Cashin of Saint John's in the island of Newfoundland widow of the first part Peter J. Cashin of the same place merchant of the second part Martin F. Cashin late of Montreal in the Dominion of Canada (but at present of Saint John's in the island aforesaid) doctor of medicine of the third part and Lawrence V. Cashin of the same place merchant of the fourth part.
>
> Whereas Michael P. Cashin of Saint John's merchant died on or about Aug. 30, 1926, having previously made and executed his last will and testament in which he bequeathed certain pecuniary legacies to the party of the first part and other parties and whereas probate to the will of the said deceased was granted by the Supreme Court of Newfoundland to Gertrude C. Cashin and Lawrence V. Cashin the executrix and executor therein named and whereas the estate of the said Michael P. Cashin is insufficient to pay the legacies bequeathed by his said will and whereas prior to his death on or about May 8, 1924, the deceased transferred and made over to the said Gertrude C. Cashin certain bonds of the government of Canada to the par value of $300,000 for her sole and absolute use and benefit and whereas payment of death duties in respect of the said bonds was claimed by the government of Newfoundland and settlement in respect of the said claim was made and whereas the parties hereto are desirous of carrying into effect the wishes of the said deceased as set forth in his said will and by the said transfer of the bonds to the said Gertrude C. Cashin now this indenture witnesseth in consideration of the premises and by way of family arrangement the parties hereto hereby agree as follows:
>
> 1. The party of the first part agrees and undertakes to provide such a sum over and above the realised value of the estate of the said deceased as will be sufficient to pay all the liabilities of the said deceased at the time of his death and all death duties paid or payable to the government of Newfoundland in respect of his estate and all the pecuniary legacies bequeathed by the said deceased by his said will (including the legacies to the second third and fourth parties) in full.
>
> 2. The parties of the second third and fourth parts hereby do and each of them doth recognise and admit the validity of the said transfer and making over to the said Gertrude C. Cashin of the said bonds of the government of Canada and hereby release the said Gertrude C. Cashin from any claim of them or either of them in respect thereof and in so far as they may or can have and do hereby confirm the said bonds unto the said Gertrude C. Cashin absolutely freed and discharged of any claim which they or either of them has or may or can have upon the said bonds or any part thereof.

There is no difficulty in understanding this deed. It might have been better to recite that doubts had arisen as to whether the transfer to Lady Cashin had been so completed that, notwithstanding the collection and retention of the coupons by Sir Michael, the bonds became the property of Lady Cashin on May 8, 1924, but the respondent, as well as his brothers, was fully conscious that it was on this ground that the claim of the government was made, and the respondent himself was well aware of the doubts which had existed, since he had accompanied Mr. Lawrence Cashin on the visits both to Mr. Wood, K.C., and to A Mr. Howley to obtain advice as to whether the claim of the government could safely be resisted. In these circumstances, the deed states in plain terms that Lady Cashin is to provide a sum sufficient to pay the additional estate duty and all the pecuniary legacies in full, and, on the other hand, her three sons are to give up any claim against her in relation B to the bonds. The deed does not purport to be, nor is it in substance, an agreement by the executors with the beneficiaries. Lady Cashin was in possession of the bonds, and plainly thought, and, it may be added, had stated on oath, that she had a good title to them. Mr. Lawrence Cashin, the other executor, was of the same opinion, and had pledged C himself in that sense by an affidavit of Mar. 7, 1927. The respondent, if he had wished to contest the validity of the gift, would have had to obtain the leave of the court to use the name of Mr. Lawrence Cashin, upon a proper indemnity, to sue Lady Cashin. He might well hesitate a long while to take such a step, and there was a family reason against D it—namely, the fact that the daughter, Mrs. Mary Fox, had been left out of the will, and that it was desirable to place Lady Cashin in a position to provide for her.

After the deed was executed, its provisions, so far as Lady Cashin was concerned, were at once carried out. On Sept. 9, 1927, Mr. Martin E Cashin received the sum of $20,000, the balance of his legacy of $40,000. The first $20,000 had been paid to him on account on June 18, 1927, to enable him to open an office in Montreal. The respondent and Mr. Lawrence Cashin each received his legacy of $40,000, or an equivalent in Canadian bonds, either on Sept. 9, 1927, or shortly afterwards. Their F Lordships are well aware that the respondent stated that he had received his legacy in Oct., 1926, or Nov., 1926, but on careful consideration of the evidence they are satisfied that this is not correct. His recollection in some other respects was plainly shown to be unreliable, and Mr. Lawrence Cashin was quite certain that no such payment or handing G over of bonds was made to him till after the deed which alone made such a payment or handing over a proper one.

So far as the evidence goes, peace reigned in the family till Oct., 1930. At that time the respondent asked Mr. Lawrence Cashin to destroy the deed, a request which, of course, was not complied with. The action H was commenced in 1936. The delay in commencing it is not explained. It is sought to set aside the deed, mainly on the ground that it constituted a release or gift of the bonds to a person in a fiduciary position, based upon statements therein which did not accord with the facts. In the alternative, it is contended that the deed, if intended to take effect

as a family arrangement, was an agreement *uberrimæ fidei*, casting upon the executors of Sir Michael Cashin a duty of full disclosure which they failed to fulfil. The assumption on which both these contentions rest is that the bonds had not been the subject of a complete gift by Sir Michael to Lady Cashin, and that therefore at his death they formed
A part of his estate. It seems to their Lordships that this is not the correct method of approach to the question as to whether the deed can now be set aside. The proper course is, first, to consider the true nature of the transaction embodied in the deed, and, secondly, to ascertain what facts as to the alleged gift were then known to the parties, including the
B executors, and what representations, if any, were made to, or what facts were withheld from, the respondent.

On the first point, it seems clear to their Lordships that the deed is framed, and takes effect, as a family arrangement. It does not in any true sense purport to be a sale. It is a release by the three sons of a
C doubtful claim against their mother. It is an entire mistake on the admitted facts to treat Lady Cashin as if, at the date of the deed, she were a trustee of the bonds for the beneficiaries, and that is so even if *ex post facto* it were to be decided that the gift had not been completed. Further, it is clear that Lady Cashin's position as regards the deed was
D just the same as if she had not proved the will of Sir Michael. She had no information as an executrix as to the validity of the gift, or the want of it, which she did not possess before her husband's death, and her position as executrix gave her no advantage in coming to an agreement with her sons. Nor does the deed involve a family agreement tainted
E in fact even remotely with undue influence. There is here no suggestion, to use a celebrated phrase, of influence being acquired and abused, or of confidence being reposed and betrayed: *Smith* v. *Kay* (2), at p. 779.

In this view of the transaction, it seems to their Lordships that the law as laid down by LORD ELDON, L.C., as long ago as 1819, in *Gordon*
F v. *Gordon* (3), at p. 463, is apposite:

> Where family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair,
> G and founded upon falsehood and misrepresentation, a court of equity would have a very great difficulty in permitting such a contract to bind the parties.

It will be noted that there is no mention of a necessity for independent advice, and that the agreement may well stand though the parties have greatly misunderstood their situation. On the other hand, no doubt
H there are cases in which a young and inexperienced person, more particularly if he is contracting with persons with whom he is not, owing to their position or experience, or for some other reason, on equal terms, ought as a matter of fairness to be separately advised. In the present case, the respondent was not only of more than the age of discretion, but he was also a merchant of such knowledge, experience and ability that he

was appointed in the next year to be Minister of Finance. If there was any inequality in relation to capacity to contract as between him and his mother it was clearly not due to an insufficiency on the side of the former.

Their Lordships have then to consider whether the transaction was founded upon falsehood or misrepresentation, including in that term a concealment of material facts, and whether it was unfair, having regard to the circumstances as then known, to the other parties to the deed. It has already been observed that no actual misrepresentation whatever is alleged in the statement of claim. A concealment of any material fact would no doubt be just as serious as a misrepresentation (see *Gordon* v. *Gordon* (3), at pp. 470, 473, 476), and a failure to make full and complete disclosure of the assets of the estate (apart from the bonds) was indeed alleged in the particulars, but this allegation was disproved at the trial and is not now relied on. At the trial, the respondent swore that the deed was brought to him at his office (meaning the partnership office) by his brother Lawrence, and that he had never seen it before. According to his account, it already had on it the signature of his mother. Mr. Lawrence Cashin said to him: "Mr. Wood [the family solicitor] has drafted this, and mother feels that she should get back these death duties by us signing this, and we feel this is a legal opportunity of getting back the death duties." The respondent alleges that he expressed an opinion that they would not get back the duties, and then signed the deed without reading it. The appellant Martin Cashin was also present, and, according to the respondent, he read it and signed it, and said he did not think it was worth the paper it was written on. If he said so, it could only be in regard to recovery of the duties that he made such a remark, for anyone capable of transacting business must have seen that by it Lady Cashin was making herself liable to pay a large sum (more than $60,000), and was being released from any claim to the bonds. Mr. Lawrence Cashin's account of the matter was different in important respects. In particular, he swore that the deed had been talked over repeatedly in the family, and that the respondent was fully aware of its contents. Their Lordships must observe that, on the respondent's own showing, the deed, being executed with a hope of getting a return of the duty on the bonds, must obviously have contained in some form or other a formal and final assertion, admission or acknowledgment of the validity of the gift of the bonds, since that was the only point in dispute with the government. Nor can it be forgotten that the respondent had been a party to at least three discussions on the matter, the first with the Minister of Finance, a second with Mr. Wood and a third with Mr. Howley, that he was a partner with Mr. Lawrence Cashin, and was constantly seeing him, that there was nothing whatever to prevent him from reading the deed, as his brother Martin in fact did, and that it is impossible to believe that his brother and partner, Mr. Lawrence Cashin, who had in fact four copies of the deed in his hand, could have expected that the respondent would not read it. There is no suggestion of surprise or hurry on the occasion when the deed was executed. A statement in the witness-box by the respondent that it looked as though Lady Cashin and his two brothers, to say nothing of the family lawyer, Mr. Wood, had submitted the deed to him for his signature on the chance that he would not read it, which involves an imputation of a gross and disgraceful and a most foolish fraud, is one which is plainly without foundation.

Their Lordships wish to add that, in a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed, and such knowledge of its purport that the plea of *non est factum* is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed, because it operates as a conclusive bar against him—not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law, except in those special cases where there is an equitable ground for setting aside or rectifying the deed.

There remains for consideration as a factor in the case the matter of the fairness of the transaction embodied in the deed. In view of the facts as known to Lady Cashin and Mr. Lawrence Cashin, and to Mr. Martin Cashin, was the transaction one which was unfair to the respondent? This is not a matter of balancing values which can be actuarially ascertained. An arrangement of the kind under consideration would not be unfair merely because it was generous on the one side or the other. For example, family resettlements executed between father, tenant for life, and son, tenant in tail, the latter being advised by the same solicitor as the former, have been considered reasonable and supported by the court even though, from a pecuniary point of view, the son's position is greatly prejudiced: *Savery* v. *King* (4), at p. 657, *Fane* v. *Fane* (5), and cases there cited. A parent can be generous to a son, or legitimate children to an illegitimate one, or a son to a mother, upon the occasion of a family arrangement, without its being proper or possible in equity, merely on that ground, to suggest that the arrangement is an unfair one, and ought to be set aside. It would indeed be strange if an agreement entered into by parties of full contracting capacity could be set aside in equity because, regarded from the standpoint of the family, it was generous as well as just.

It should be stated that there was another and a serious difficulty in the path of the respondent, which their Lordships think it right to mention, lest it should be thought that it has escaped notice. There are several authorities which establish the proposition that an imperfect gift followed by the appointment of the donee as executor, the intention to give continuing, entitles the donee to the property: *Strong* v *Bird* (6), *Re Stewart*, *Stewart* v. *McLaughlin* (7), *Re Pink*, *Pink* v. *Pink* (8), and see, as to the meaning of the words "a continuing intention," the remarks of KENNEDY, L.J., at pp. 538, 539. The point was not considered in the courts of Newfoundland, and their Lordships think it better to express no opinion as to it.

In relation to the execution of the deed in this case, their Lordships have been unable to come to the conclusion that there was any material fact which was not known to the respondent bearing upon the question of the prospects of proceedings against Lady Cashin to recover the bonds. The respondent, as appears from his own evidence, had all along known that Sir Michael, after May, 1924, had collected the interest on the bonds, and he also knew of the contents of the will, and of the claim by the government. For the reasons already given, the respondent could not, in the circumstances, have the deed set aside because it was a record of an unsatisfactory bargain on his part; but it may be well to add that, in the opinion of their Lordships, even that is not made out. True it is that two judges, including the chief justice, have come to the conclusion, twelve years after the event, that the completeness of the gift of the bonds was not established. KENT, J., came to an opposite conclusion. The recollection of the persons concerned, so long after the transaction in May, 1924, was plainly a good deal impaired, and it was probably for that reason that Lady Cashin's evidence left several matters untouched and unexplained. Their Lordships do not think it necessary to express an opinion as to whether the bonds were effectively given to Lady Cashin or not. They are satisfied that proceedings against her in 1927 would have had very doubtful prospects of success, and on this view the deed was in no sense unfair to the respondent.

To summarise, their Lordships have come to the conclusion that there was neither concealment of material facts nor any want of fairness in the transaction embodied in the deed. Their Lordships are accordingly of the opinion that the appeal must be allowed and the action must be dismissed with costs here and below. They will humbly advise His Majesty accordingly.

Solicitors: *Allen & Overy* (for the appellants); *Lawrence Jones & Co.* (for the respondent).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

Dictum of SIR WILFRID GREENE, M.R., at p. 554, *applied.* STROMDALE & BALL, LTD. *v.* BURDEN. [1952] All E.R. 59.

WHITE *v.* BIJOU MANSIONS, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Luxmoore and Farwell, JJ.), **February 8, 9, 1938.**]

Sale of Land—Restrictive covenant—Benefit of covenant—Assigns of purchasers from common vendor—Person not party to, nor referred to in, deed containing covenant—Law of Property Act, 1925 (c. 20), *s.* 56 (1).

In 1886, the Davidsons entered into an agreement with the Daws for the sale to them of an estate in Bayswater, the Daws to take conveyances or long leases of parts of the property, as sales of houses to be erected thereon might be effected. It was provided that every lease or conveyance should contain a covenant that the premises should be used as a private residence only. On Dec. 17, 1886, the Davidsons conveyed to F., with the concurrence of the Daws, a part of the property, and in the conveyance F. covenanted to use the premises erected thereon as a private residence or as the place of practice of a medical man. The Daws in the same conveyance entered into a covenant, expressed to be binding on them and on all persons taking the residue of the estate, that the purchasers or lessees of every building lease or other assurance of the estate should covenant with the Daws, their heirs or assigns, that, *inter alia*, the premises should, subject to certain powers of modification, be used as and for private dwelling-houses only. The Daws then covenanted that the restrictions should apply to any houses built by or for the Daws themselves, and then further covenanted that they would, at the request of F., his heirs and assigns, prosecute all legal proceedings necessary to secure the observance of the restrictions by the owners for the time being of the remaining parts of the estate. On May 2, 1890, the Davidsons and the Daws, as vendors, conveyed another plot to N. In his conveyance, N. covenanted for himself, his heirs, executors, administrators and assigns, to the intent to bind himself and his successors in title, the owners for the time being of the premises thereby conveyed, with the Davidsons, their heirs and assigns, that any buildings erected on the property conveyed should be used as a private residence only, or, subject to certain conditions, for the purposes of a medical man. In this conveyance to N., there was no restrictive covenant by the Daws or by the Davidsons. No conveyances, other than the two above referred to, of any part of the estate were put in evidence. The plaintiff, as an assign of F., sought to restrain the defendants, as persons deriving title from N., from committing a breach of the restriction to use the buildings erected on the land for any purpose other than that of a private dwelling-house, contending that it was the intention that this covenant should be enforceable by those deriving title under N. against those deriving title under F. It was further contended that F. or his successors in title could enforce the covenant as a person taking the benefit of a covenant, although not named as a party under the Law of Property Act, 1925, s. 56 (1):—

HELD: (i) it was impossible to draw from the two conveyances in evidence that the estate was subject to some common regulations binding upon all purchasers, and enforceable by any one purchaser against every other, because the facts did not show that each purchaser contemplated at the time of his purchase that he was entering into any such liability.

(ii) F. was not an assign of the Davidsons within the meaning of that word as used in the covenant in the conveyance to N. The word "assigns" in that covenant meant such persons as might take from the Davidsons any part of the estate then still vested in them, and it did not include the previous assigns of the Davidsons. The Law of Property Act, 1925, s. 56 (1), did not enable the plaintiff to enforce the restriction as a party within the benefit of the covenant.

Decision of SIMONDS, J. ([1937] 3 All E.R. 269) *affirmed.*

[**EDITORIAL NOTE.** In the main, this appeal deals with the right of persons deriving title under purchasers of parts of an estate to enforce restrictions placed upon it *inter se*. It was contended that an intention that such remedies should be available could be inferred in circumstances which did not amount to a building scheme. It will be noted in the present case, not only that there was a dissimilarity in the covenants in the two conveyances before the court, but also that the conveyances of other parts of the estate were not in evidence, nor was there any evidence as to the nature of the covenants contained in them. The plaintiff further relied upon the Law of Property Act, 1925, s. 56 (1), but here it was held that the covenant in its terms was not intended to include the assigns of purchasers purchasing before the date of the covenant.

As to Benefit of Restrictive Covenants, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 456-461, paras. 830-835; and for Cases, see DIGEST, Vol. 40, pp. 311-314, Nos. 2659-2675.]

Cases referred to:

(1) *Nottingham Patent Brick & Tile Co.* v. *Butler* (1885), 15 Q.B.D. 261; *on appeal* (1886), 16 Q.B.D. 778; 40 Digest 238, *2070*; 55 L.J.Q.B. 280; 54 L.T. 444.

(2) *Elliston* v. *Reacher*, [1908] 2 Ch. 665; 40 Digest 309, *2646*; 78 L.J.Ch. 87; 99 L.T. 701.

(3) *Nicoll* v. *Fenning* (1881), 19 Ch.D. 258; 40 Digest 324, *2737*; 51 L.J.Ch. 166; 45 L.T. 738.

(4) *Mann* v. *Stephens* (1846), 15 Sim. 377; 40 Digest 314, *2676*.

(5) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 40 Digest 312, *2664*; 69 L.J.Ch. 652; 83 L.T. 186.

Appeal from a judgment of Simonds, J., dated May 28, 1937, and reported in [1937] 3 All E.R. 269.

Alexander Grant, K.C., and *Roger Turnbull* for the appellant.

R. F. Roxburgh, K.C., and *W. F. Waite* for the respondents.

Grant, K.C.: Having regard to the circumstances of this case, there arises in me a right, either contractual or by implication, to enforce this covenant. The effect of the creation of a restrictive covenant binding property is the same as that of an easement, and such a covenant accordingly binds the property in the hands of anyone who gets possession of it with notice. The following words from the Law of Property Act, 1925, s. 56, are relevant:

> (1) A person may take . . . . the benefit of any . . . . covenant or agreement over or respecting land . . . . although he may not be named as a party to the conveyance . . . .

Apart altogether from building-schemes, if it appears from the circumstances of a case that a certain covenant is to enure for the benefit of any individual, he can sue upon it. The authority for this is *Nicoll* v. *Fenning* (3), which is on all fours with the present case. [Counsel referred to *Mann* v. *Stephens* (4), *Nottingham Patent Brick & Tile Co.* v. *Butler* (1), *Rogers* v. *Hosegood* (5).]

Roxburgh, K.C., was not called on.

Sir Wilfrid Greene, M.R.: The respondents to this appeal are the holders of a lease of premises known as No. 18, Palace Court, Bayswater. That lease was dated Apr. 16, 1935, and was assigned to the respondents by an assignment or pursuant to an agreement dated May 12, 1936. The respondents are entitled, according to the terms of the agreement, and of the lease itself, to use the premises for private suites or flats. That is what they are doing, or are intending to do, because they have altered, or are intending to alter, the premises so as to make them suitable for use and occupation as what are called "flatlets." The appellant seeks to restrain that user, and seeks to do so because he says that the respondents are bound by a restrictive covenant affecting the freeholder from whom their lease was derived, a covenant of which they have notice. SIMONDS, J., held that, although notice, so far as it is necessary, or would have been necessary, is to be imputed to the respondent, the present appellant was not entitled to enforce against the respondents the restrictive covenant in question.

The first and main question in the case is whether or not there is
A affecting this property a restrictive covenant confining its user to the purposes of a private dwelling-house of which the appellant can take advantage. It is necessary to go a little into the history of the estate upon which the houses stand. There was in 1886 an estate on the north side of the Bayswater Road called the Shaftesbury House Estate. It
B ran back from the Bayswater Road to Moscow Road, and it had a frontage of 305 ft. to the Bayswater Road, and 224 ft. to Moscow Road. That estate belonged to some people of the name of Davidson. There was a Colonel Davidson and a Miss Davidson, and the Davidsons on June 12, 1886, entered into an agreement with two gentlemen of the
C name of Daw for the sale to them of the estate. The purchase price was £55,000, and the purchasers were to pull down the existing buildings and make a road. That road is in fact the road at present known as Palace Court Road. The scheme for completing the conveyance of the property and its development was of this nature. The purchasers
D were entitled to grant building leases, or to sell the fee simple of any parts of the property. There were provisions as to the minimum ground rents on the grant of the building lease, the cost of houses, and the minimum frontage over which they were to extend. There was a provision that, as soon as a house was built, the vendors—that is, the
E Davidsons—should grant a lease, and that was to include a covenant to use the premises as and for a private residence only, and that lease might have an option of purchase. There was an alternative provision by which, instead of granting a 99 years' lease at a ground rent, the vendors were to convey a piece of land in fee simple on receiving a certain
F number of years' purchase of the ground rent. It provided that such conveyance was to contain a covenant to use the ground conveyed, or any buildings to be erected thereon, as and for a private residence only, or for purposes connected therewith. Completion was to take place on June 24, 1890. I do not think that there are any other provisions
G in the document to which I need refer. It must be observed in connection with it that, in view of the piecemeal provisions for completion, if I may so call them, and of the possibility, which always exists in cases of this kind, that purchasers will not be able to carry out the whole of the purchase by getting rid of all the lots, the provisions with
H regard to the covenants as to user would be provisions certainly for the benefit of the vendors, because it would enable them, if any part of the property were thrown back on their hands, to ensure the maintenance of the property as a residential estate.

The present appellant, the plaintiff in the action, is the successor in title of a Mr. Fellows, and Mr. Fellows seems to have been, if not the first, at any rate one of the earliest, purchasers of plots on this estate, because on Dec. 17, 1886, there was conveyed to him on sale for the sum of £6,700 the fee simple of a piece of land on which there now stands a house known as No. 16, Palace Court. The conveyance is made between the Davidsons of the first part, the Daws of the second part, and Mr. Fellows of the third part. It recites the agreement, it recites the contract to sell to Mr. Fellows, and it conveys to Mr. Fellows the property in question. It contains a covenant by Mr. Fellows to build and to use the houses erected and all buildings to be erected thereon as and for a private residence, and for no other purpose except for the residence and place of practice of a medical man, subject to stipulations, and the Daws enter into an elaborate covenant. The covenant into which they enter is a covenant, expressed to be binding on them and all persons taking the residue of the estate, that every building lease or other assurance of the estate shall contain certain covenants by the purchasers or lessees. The covenants which were to be contained in those documents were to be covenants with the Daws, their heirs or assigns, and they were to be covenants regulating the building on the plots in specified manners under several heads, including the covenant to use the land comprised in any such lease or conveyance and all buildings thereon save as aforesaid (the meaning of which I will explain in a moment) as and for private dwelling-houses only, and for no other purpose whatsoever. The Daws, therefore, are agreeing with Mr. Fellows that, when they come to sell other plots on the estate, they will procure the purchasers to enter into a covenant with themselves, the Daws, to observe this series of six stipulations (there are six in all). The stipulation with regard to user is not an absolute stipulation confining the user to that of a private dwelling-house, but contains modifications (to which the words "save as aforesaid" refer), and one of the modifications is that shops may be erected on the Moscow Road frontage, and I think one other place, but it does not matter. The important thing to notice is that the restrictive covenant which the Daws undertake to take from future purchasers is not identical with the restrictive covenant in the original agreement which I have read, in which there was no power to erect shops. Presumably, so far as the Daws were entitled to allow the erection of shops, they could only have obtained that right by a concession from the Davidsons. The document then goes on and contains a covenant by the Daws to the effect that the six stipulations to which I have referred should apply to any houses built by or for the Daws themselves, or any land which, for the time being, should remain unbuilt on. That I may describe as a transitory provision, designed to fill up the gap which might be caused in the event of the Daws building a house or leaving the land unbuilt upon for some time. As soon as they assign or let the undertaking to obtain from the lessee or purchaser, the covenant I have referred to, of course, will take its place. It is a transitory provision, inserted in order to ensure that, so long as land remains in the hands of the Daws, Mr. Fellows should have the same right against the Daws as the Daws would have against the purchasers or lessees under the covenants which the Daws agreed to obtain. The Daws go on to covenant that they will, at the request of Fellows, his heirs and assigns:

> commence and prosecute all such legal proceedings as shall be necessary or proper for compelling the observance and performance of cll. 1 to 6 both inclusive by the person or persons for the time being owners of part or parts of the said Shaftesbury House Estate not hereby granted and assured.

The scheme, therefore, which Mr. Fellows was getting for his protection was that the Daws were to exact these covenants from future lessees or purchasers, and the Daws agreed with Mr. Fellows that at the request of Mr. Fellows they would enforce them. That was the method by which Mr. Fellows was to be protected. The house which is in the possession of the respondents was built on land comprised in a conveyance of May 2, 1890, to one Nicholson. That was a conveyance by the Davidsons, and the Daws, who are called the vendors. It recites, amongst other things, the original agreement for sale by the Davidsons to the Daws, and it recites the stipulation therein contained that the conveyance should contain a covenant to use the ground conveyed, or any buildings to be erected thereon, as and for a private residence only, or for purposes connected therewith. Then it contains after the grant a covenant by the purchaser:

> for himself his heirs executors administrators and assigns to the intent to bind himself and his successors in title and the owners for the time being of the piece of ground and premises hereby conveyed and covenants with the said parties hereto of the first part [those are the Davidsons, not the Daws] their heirs and assigns that the said piece of ground hereby conveyed and any buildings to be erected thereon shall at all times hereafter be used as and for a private residence only or for purposes connected therewith but so that this covenant shall not affect the right to use the premises for the purposes of a medical man in manner and subject as hereinafter provided.

That is the restriction entered into by Nicholson which the present plaintiff says he is entitled to enforce. Then comes an undertaking by the purchaser with regard to building frontages, cost of buildings, and so forth, which I do not think I need read. It contains a covenant that the purchaser:

> shall use the piece of ground and all buildings thereon save as aforesaid as and for private dwelling-houses only and for no other purpose whatever.

There is no restrictive covenant by the Daws, there is no restrictive covenant by the Davidsons with regard to that portion of the estate which had not, up to that date, been sold. I need not go into the intervening title.

The present plaintiff as an assign of Fellows seeks to restrain the present respondents, as persons deriving title from Nicholson, from committing a breach of that covenant. The way in which the case is put by Mr. Grant is this. He says that the case is one of the class of cases of which perhaps the most familiar example is to be found in

Nottingham Patent Brick & Tile Co. v. *Butler* (1). In order to indicate the way in which the case is put, I cannot do better than quote two passages from that case, because Mr. Grant says that, upon the facts of this case, it falls exactly within the language there used. The first passage is from the judgment of WILLS, J., at p. 268:

> Where the same vendor selling to several persons plots of land, parts of a larger A property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to B take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit.

When that case went to the Court of Appeal, LORD ESHER, M.R., approved the judgment of WILLS, J., and himself used a phrase which, I think, brings out another important aspect of this class of case. This C is how LORD ESHER, M.R., states the question, at p. 784:

> The question, whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention.

D

The class of case which is there being dealt with is that where it is possible and proper to infer, from the facts of the case, an agreement by which all the purchasers agree to be bound *inter se*, by which is meant that each purchaser shall have the right to enforce restrictions against each other purchaser. LORD PARKER in *Elliston* v. *Reacher* (2) (a building- E scheme case) pointed out that the implication of a contract will not meet every case, and he preferred to say that the community of interest imported reciprocity of obligation. However that may be, there are certain matters which must be present before it is possible to say that covenants entered into by a number of persons, not with one another, F but with somebody else, are mutually enforceable. The first thing that must be present, in my view, is some common regulations intended to apply to the whole of the estate in development. When I say common regulations, I do not exclude, of course, the possibility that the regulations may differ in different parts of the estate, or that they may be subject G to relaxation. The material thing, I think, is that every purchaser, in order that this principle can apply, must know, when he buys, the regulations to which he is subjecting himself, and the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless one has that, it is quite impossible, in my judgment, H to draw the necessary inference, whether one refers to it as an agreement or as a community of interest importing reciprocity of obligation. When the present case is examined, it appears to me that the essential circumstances are entirely lacking. Mr. Grant, if I understood his argument correctly, first of all treated the regulations affecting the estate as being those set out in the conveyance to Fellows. It must be observed that those regulations cannot possibly be common to the whole estate because there is not a particle of evidence that anybody else was given a covenant of that kind, or that Nicholson, or any other purchaser, knew that any such covenant had been given. In fact, the provisions in regard to Fellows really become quite irrelevant for this purpose. The argument ultimately came to this, that it is in the original agreement that the regulations common to the estate are to be found. We were invited to assume that every purchaser on the estate bought with knowledge of the terms of the restrictive covenant in the agreement, and with knowledge of the fact that every other purchaser had entered into a similar covenant, or would in the future enter into such a covenant. Unless it is possible to draw an inference of that kind, it appears to me that the principle of the cases which have been referred to cannot possibly apply. In the present case, I am quite unable to draw any such inference. We have before us two conveyances, and two conveyances only. We know nothing whatever about the other houses on the estate, or the circumstances in which they were sold, whether or not they contained any, and, if so, what, restrictive covenants. The only conveyances which we have being the two in question, it is quite impossible to draw any inference as to any intention on the part of anybody to apply to this estate some common regulations, which would be, and were, brought to the notice of all purchasers in such circumstances that each purchaser was entitled to infer that all other purchasers would be bound by them, and was willing to accept the liability towards every other purchaser. It is an aspect of the matter which is very important, in my judgment, that, before one can apply this principle, one must be able to infer from the facts that each purchaser contemplated that he was entering into a liability, not only to his vendor, but also to a number of other persons, which they could all directly enforce against him.

I may add that, when one looks at Mr. Fellows' own conveyance, it bears on the face of it, so far as it is permissible to look at it for this purpose, what seems to be a very clear indication that it was not the intention of anybody that Fellows should be entitled to enforce these covenants direct, because the conveyancing machinery adopted is one under which the vendors agreed on subsequent sales to take covenants from the purchasers, and to enforce those covenants at the instance of Mr. Fellows. That was a special provision which Mr. Fellows got put into his conveyance, and which does not appear in Mr. Nicholson's conveyance. That appears to me to be inconsistent with the view that Mr. Fellows was intended to get an independent right himself to sue subsequent purchasers on the footing that the original agreement was a sort of code that was going to be brought to the notice of all such purchasers. The inference can easily be drawn in a case where property is put up for sale by auction in lots. There the conditions of the sale are, so to speak, the charter or code which one must apply to the

territory in which the regulations are to prevail. The fact that all the lots are not sold at the auction does not prevent the application of the principle. In the present case, that element of proof, that foundation for the drawing of the necessary inference, is entirely absent, and we are completely in the dark as to the position with regard to any other purchaser of the estate. In my opinion, the facts fall far short of anything A
which would entitle us to apply the principles relied upon.

That really disposes of the appeal, subject to one point. Mr. Grant relied on the Law of Property Act, 1925, s. 56 (1), but he conceded that, if he were right on his first point, and could enforce the covenant, he had no need to rely on sect. 56 (1), and that, if he were wrong on his B
first point, it would mean that the covenant was not a covenant for his benefit, and then sect. 56 (1) would help him. The covenant is the covenant by Nicholson. The suggestion was that Mr. Fellows, and his successors in title, could take advantage of the covenant of Nicholson under the terms of the section. The section is in these words: C

> (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

The conveyance is the conveyance, of course, of Nicholson. The covenant D
is the covenant of Nicholson relating to user as a private dwelling-house. Although Mr. Fellows was not a party, and the successors in title of Mr. Fellows were not parties, they are entitled to take the benefit of it. Mr. Grant did not feel able to press that point, but Mr. Turnbull made the submission upon it that, when the covenant in question by Nicholson E
is looked at, it is expressed to be a covenant with the parties hereto of the first part, their heirs and assigns, the parties of the first part being the Davidsons. Mr. Turnbull said that Mr. Fellows was an assign within the meaning of that phrase as used in the covenant, notwithstanding the fact that Mr. Fellows had taken his conveyance some two or three F
years before. In my opinion, that is not the true construction of this covenant. It seems to me, reading the covenant in the light of the circumstances of the case at the time, that the assigns of the Davidsons who are referred to are such persons as thereafter would take from the Davidsons any part or unsold portion of the estate which still remained G
vested in them, and it does not as a matter of construction cover the previous assigns of the Davidsons. That being so, if that view be correct, it would be quite impossible to bring the matter within sect. 56, because, whatever else sect. 56 (1) may mean, it is, I think, confined to cases where the person seeking to take advantage of it is a person within the H
benefit of the covenant in question, if I may use that phrase. The mere fact that somebody comes along and says, "It would be useful to me if I could enforce that covenant," does not make him a person entitled to enforce it under sect. 56 (1). Before he can enforce it, he must be a person who falls within the scope and benefit of the covenant according

to the true construction of the document in question. In the present case, the present appellant does not fall within the benefit of the covenant, and, in my opinion, the argument on sect. 56 (1) fails. That, I think, deals with all the points in the case, and the appeal must be dismissed with costs.

LUXMOORE, J.: I agree, and I have nothing to add.

FARWELL, J.: I agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *T. & N. Blanco White* (for the appellant); *Laytons* (for the respondents).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

PRATT *v.* COOK SON & CO. (ST. PAUL'S). LTD.

[KING'S BENCH DIVISION (Wrottesley, J.), **February 3, 4, 7, 11, 1938.**]

Master and Servant—Wages—Deductions in respect of meals—Necessity for written agreement—Agreement between trade union and masters' association—Truck Act, 1831 (*c.* 37), *ss.* 3, 4, 19, 23—*Employers and Workmen Act,* 1875 (*c.* 90), *s.* 10—*Truck Amendment Act,* 1887 (*c.* 46), *s.* 2.

Limitation of Actions—Specialty—Right of action conferred by statute—Civil Procedure Act, 1833 (*c.* 42), *s.* 3.

The plaintiff was employed as a packer by a firm of wholesale drapers at a weekly wage of 53*s.*, and it was agreed that dinner and tea supplied by the firm were worth an additional 10*s.* per week. The plaintiff claimed that the above sum of 10*s.* was an improper deduction under the Truck Act, 1831, ss. 3, 4, and that he was entitled to recover the sums deducted as a specialty debt, so that the period for the purposes of the Statutes of Limitation was twenty years. The defendants contended (i) that the plaintiff was not a labourer or otherwise engaged in manual labour within the meaning of the Truck Acts; (ii) that the deduction was one they were entitled to make under the Truck Act, 1831, s. 23, but to this it was objected that there was no agreement in writing signed by the plaintiff to permit these deductions; and (iii) that certain agreements made between the plaintiff's trade union and the masters' association were sufficient agreement in writing within the Truck Act, 1831, s. 23. These agreements were signed by an official of the union and the association, but the defendants at all times insisted on negotiating with their own men direct:—

HELD: (i) the plaintiff was employed in manual labour within the Truck Acts.

(ii) a written agreement signed by the servant is essential to the validity of any of the deductions mentioned in the Truck Act, 1831, s. 23, and the agreement between the union and the association was not such an agreement.

(iii) the right of action conferred by the statute was a right of action for debt upon a specialty, and the period of limitation was twenty years.

[**EDITORIAL NOTE.** This case raises a number of points under the Truck Act, 1831. The first point is in substance whether or not the workman in this case was engaged in manual labour, upon which the court, following the previous decisions, has held that it is necessary only that manual work should be a substantial part of his employment. The second point is concerned with an attempt to substitute an agreement between a trade union and a masters' association for an agreement by the workman, but this point was decided upon a question of fact, it being decided that in fact the masters were not in any event a party to the agreement. The last point, on the appropriate period of limitation, is decided by applying the principle applied to the case of a call on shares in *Cork & Bandon Ry. Co.* v. *Goode* (10).

As to Deductions from Wages, see HALSBURY, Hailsham Edn., Vol. 14, pp. 654-658, paras 1237-1241; and for Cases, see DIGEST, Vol. 24, pp. 934-941, Nos. 229-284.] A

Cases referred to:

(1) *Bound* v. *Lawrence*, [1892] 1 Q.B. 226; 34 Digest 113, *848*; 61 L.J.M.C. 21; 65 L.T. 844.

(2) *Jaques* v. *Steam Tug Alexandra*, [1921] 2 A.C. 339; 34 Digest 253, *2172*; 126 L.T. 46; *sub nom.* *Jacques* v. *Alexandra* (*Owners*), 90 L.J.K.B. 1325. B

(3) *Morgan* v. *London General Omnibus Co.* (1884), 13 Q.B.D. 832; 34 Digest 222, *1838*; 53 L.J.Q.B. 352; 51 L.T. 213.

(4) *R.* v. *Louth JJ.*, [1900] 2 I.R. 714; 24 Digest 934, case *h*.

(5) *Chawner* v. *Cummings* (1846), 8 Q.B. 311; 24 Digest 940, *276*; 15 L.J.Q.B. 161; 6 L.T.O.S. 364. C

(6) *Archer* v. *James* (1862), 2 B. & S. 67; 24 Digest 940, *277*; 31 L.J.Q.B. 153; 6 L.T. 167.

(7) *Pillar* v. *Llynvi Coal & Iron Co., Ltd.* (1869), L.R. 4 C.P. 752; 24 Digest 938, *265*; 38 L.J.C.P. 294; 20 L.T. 923.

(8) *Cutts* v. *Ward* (1867), L.R. 2 Q.B. 357; 24 Digest 938, *264*; 36 L.J.Q.B. 161; 15 L.T. 614. D

(9) *Re Whitley Partners, Ltd.* (1886), 32 Ch.D. 337; 1 Digest 281, *133*; 55 L.J.Ch. 540; 54 L.T. 912.

(10) *Cork & Bandon Ry. Co.* v. *Goode* (1853), 13 C.B. 826; 32 Digest 320, *59*; 22 L.J.C.P. 198; 21 L.T.O.S. 141.

(11) *Kenyon* v. *Darwen Cotton Manufacturing Co., Ltd.*, [1936] 2 K.B. 193; [1936] 1 All E.R. 310; Digest Supp.; 105 L.J.K.B. 342; 154 L.T. 553. E

(12) *Gutsell* v. *Reeve*, [1936] 1 K.B. 272; Digest Supp.; 105 L.J.K.B. 213; 154 L.T. 1.

(13) *Aylott* v. *West Ham Corpn.*, *Sisson* v. *West Ham Corpn.*, [1927] 1 Ch. 30; 32 Digest 321, *65*; 95 L.J.Ch. 533; 135 L.T. 424.

(14) *Thomson* v. *Clanmorris* (*Lord*), [1900] 1 Ch. 718; 32 Digest 320, *57*; 69 L.J.Ch. 337; 82 L.T. 277. F

(15) *Penman* v. *Fife Coal Co., Ltd.*, [1936] A.C. 45; Digest Supp.; 104 L.J.P.C. 74; 153 L.T. 261.

Sir Stafford Cripps, K.C., *F. W. Beney*, and *Neil Lawson* for the plaintiff.

F. P. M. Schiller, K.C., *G. O. Slade*, and *C. M. Cahn* for the defendants. G

Wrottesley, J.: The facts of this case are not in dispute. The plaintiff, who had been for many years employed by Cook Son & Co., wholesale drapers, of St. Paul's Churchyard, joined the Army at some time in 1915, and on his return in 1919 was re-engaged by that firm. The terms of his employment were that he should be paid 53*s.* weekly, plus dinner and tea. In the course of negotiating as to what his wages should be, he asked for and saw Mr. Pragnell, the general manager. At the interview, Mr. Pragnell said to him: H

> We are giving you 53*s.* a week, and you will agree your dinner and tea are worth an additional 10*s.*

To this the plaintiff assented, and worked on those terms for that firm until Mar. 8, 1920, when the defendant company came into existence, and took over the business of the firm. The plaintiff continued in the employment of the company as a packer, receiving always the wage which complied with the minimum rate of wages paid to packers in the employment of the company, less 10*s.*, and received also his dinner and tea. For a short period prior to Apr., 1920, the wages he was paid, together with dinner and tea valued at 10*s.*, amounted to 3*s.* over the minimum rate of wage applied to packers employed by the firm.

On Dec. 1, 1935, as a result of an agitation for which the plaintiff himself was partly responsible, a ballot was taken of those of the employees who were receiving dinner and tea, and, the majority having decided against the provision of dinner and tea, the defendants handed over part of their premises to the men concerned rent free, to enable them to set up their own canteen, and from that date until Mar., 1936, the plaintiff received, by way of wages, an additional 10*s.* weekly. No suggestion was made at any time that the food supplied to the men was not well worth the 10*s.* From time to time the National Amalgamated Union of Shop Assistants, Warehousemen and Clerks, of which the plaintiff was a member, fixed by agreement with the Wholesale Textile Association, representing the masters, the scales of pay applicable to various grades of employees, and agreed on the conditions of employment. The plaintiff was one of the persons who assisted in bringing these terms into existence, his interest being, as he said, that these terms should be applied to the workers employed by the defendants, and, generally speaking, he approved of the terms so agreed between the union and the association, and in particular he told me that he had approved the condition which was entitled " living in." The terms of that condition, which remained in all the various agreed scales and conditions, were as follow :

> 4. Living in—Allowance for board, 10*s.* ; board and lodging, 20*s.* ; 12*s.* 6*d.* for board and lodging when on holidays, statutory holidays not included. Those living in to live out if they so desire by giving one week's notice and employers to give the same notice if they desire employees to live out.

This condition was in force, anyhow, from July 27, 1921, until some date in 1929, when the Union gave notice to determine the arrangements. Throughout the period covered by the claim, these conditions and scales of pay were applied by the defendants, and the plaintiff regarded himself as being employed on the terms of these agreements. The plaintiff was employed as a packer, and the nature of his work was to assemble crates which, when not in use, were kept in bundles, to line them with packing-material, to cord them together, to nail on the top, and then either to stencil or to attach the label showing the destination. He also packed cases which he would have to label after cording them, and cartons. For 8 months in the year, he packed all manner of straw hats, particularly ladies' hats. For the other 4 months, he was packing heavier materials, such as draperies, carpets, calico, children's underclothing and linoleum. Some of the packing consisted of stitching canvas covers round rolls of material. After the packing was completed, the packages were taken away by porters.

On these facts, the plaintiff claims that he was a manual worker employed by the defendants, and that he was, from Mar. 8, 1920, to Dec. 1, 1935, remunerated for his services partly in current coin of the realm and partly not in current coin, and that to the extent of 10*s.* weekly he was throughout the period paid by the provision of meals. He claims, therefore, under the Truck Act, 1831, ss. 3, 4, that the payment in meals was illegal, null and void, and that he is entitled to recover from the defendants the whole of that part of the wages he earned that was not paid to him in current coin of the realm—that is to say, 10*s.* weekly. The defendants say that the plaintiff was not a manual worker, and so is not entitled to the protection of the Truck Acts. Further, the defendants say that the plaintiff was not remunerated partly by current coin and partly by meals, but that the plaintiff was paid the amount of money which in fact he received, and that the provision of meals was a thing which the firm chose to do voluntarily, and this, they say, was permissible under the Truck Acts, and they rely on the Truck Act, 1831, s. 23, as making it lawful to supply their employees with victuals, dressed or prepared, under the employers' roof. In addition, they say that the terms agreed with the union, of which the plaintiff was a member, form, if it be needed, an agreement in writing, which would make the deductions lawful. Further, the defendants say that, if the claim is well-founded at all, the plaintiff is only entitled to recover in respect of wages not paid in current coin over a period of two years prior to the issue of the writ, or at most over a period of six years. In answer to the defendants' contention that they are entitled to supply their employees with victuals under the Truck Act, 1831, s. 23, the plaintiff says that what in effect was done was to stop his wages to the extent of 10*s.* weekly in respect of the victuals with which he was supplied, and that the employer could do this only if he first obtained an agreement or contract in writing signed by the plaintiff himself. Finally, as regards the period of limitation governing the claim, the plaintiff says that this period is 20 years, because his claim is for a debt upon a specialty—namely, an Act of Parliament, the Truck Act, 1831.

The first matter to be decided is whether the plaintiff is within the protection of the Truck Acts. When the Truck Act, 1831, was passed, it was limited in its application to persons employed in manufacture and persons employed in mines and quarries. (See sect. 19.) But by the Truck Amendment Act, 1887, s. 2, the application of the Act of 1831 was extended to cover any workman as defined in the Employers and Workmen Act, 1875, s. 10, and that definition is as follows:

> The expression "workman" does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry,

journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer. . . .

The question therefore depends for its answer upon whether the plaintiff is a labourer or is engaged in manual labour. The test to be applied is, first, whether manual labour is his real and substantial employment: *Bound* v. *Lawrence* (1). Further, it has been held by the House of Lords in *Jaques* v. *Steam Tug Alexandra* (2), where the phrase "manual labour" fell to be interpreted by LORD SUMNER, at p. 345, that the test of what is not manual labour is that it should principally involve the exercise of mental qualities. It has been said by SIR WILLIAM BRETT, M.R., in *Morgan* v. *London General Omnibus Co.* (3), in considering the status of an omnibus conductor for the purposes of the definition which I have to construe, that the judges must use their own knowledge of the various employments existing throughout the realm. After listening closely to the nature of the work done by the plaintiff as he described it, and to the answers he gave in cross-examination, I have come to the conclusion that he was engaged in manual labour. It is perfectly true that much skill is required of a packer, at any rate in regard to some of the goods which had to be packed in this business. Nevertheless, the phrase "manual labour" certainly does not exclude the exercise of skill. The plaintiff's real job was to work with his hands, and the nature of his work, is, I think, properly described as manual labour. A number of cases was cited to me, including all those referred to by PALLES, C.B., in *R.* v. *Louth JJ.* (4), which are really only the application of these principles to particular forms of employment. The plaintiff being, therefore, a person who is entitled to the benefit and protection of the Truck Acts, the next question is whether, on the facts set out above, he received a part of his wages not in current coin of the realm. If he did, such payment was made illegal, null and void by the Truck Act, 1831, s. 3, and he is entitled under sect. 4 to recover from the defendants, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, so much of the wages earned by him as were not actually paid to him in coin. It is important at this stage to bear in mind the definitions of "wages" and "contract," which are to be found in sect. 25 of the Act. They are as follow:

> In the meaning and for the purposes of this Act . . . any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the "wages" of such labour; and within the meaning and for the purposes aforesaid any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a "contract".

Upon the evidence, I have no doubt that in fact ever since 1920, indeed, ever since 1919, the plaintiff has been remunerated for his labour partly, and to the extent of 10*s.* weekly, by the provision of dinner and tea, which he had under his employers' roof. It is true that the plaintiff never asked whether he could receive instead of meals their value, or 10*s*. weekly. Indeed, the plaintiff knew and admitted that he was being dealt with on the terms which his own union had agreed with the association of masters, and it will be remembered that one of those terms was "allowance for board, 10*s*." Moreover, when the plaintiff was on holiday, he always got the 10*s*. in cash extra to make up for the food which he did not consume. The plaintiff said that, had he demanded 10*s*. instead of food, it would have meant his dismissal. No evidence was called to deny this. Indeed, in 1933, Mr. Hann, an official of the plaintiff's union, having written to the defendants' manager suggesting that the men should receive money instead of meals, the latter replied that the firm did not see their way to make any alteration in the arrangements for meals, which they considered to be most satisfactory, both from the men's point of view, in that they were sure of a solid meal, and from the firm's point of view, because they knew that their employees were well nourished. The view expressed by the defendants is both humane and reasonable, but I find it difficult to reconcile that point of view with the suggestion that the meals so provided were not given as part of the remuneration for the labour done by the plaintiff. I am satisfied, therefore, that, throughout the period covered by the claim, the defendants paid the plaintiff partly by the money that they paid him weekly, and to the extend of 10*s* by the meals which they provided.

The defendants say, however, that the provision of meals is permissible under the Truck Acts. The Truck Act, 1831, s. 3, is as follows :

> *All wages shall be paid to the artificer in coin.—Payment in goods declared illegal.* The entire amount of the wages earned by or payable to any artificer . . . in respect of any labour by him done . . . shall be actually paid to such artificer in the current coin of this realm, and not otherwise ; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void.

The words "except as hereinafter mentioned" refer, first, to sect. 8 of the Act, which permitted payment by Bank of England notes, and, in certain circumstances, by cheque, and, secondly, to sect. 23 of the Act, which is as follows :

> *Particular exceptions to the generality of the law.* Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, from supplying or contracting to supply to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation ; nor from demising to any artificer . . . the whole or any part of any tenement at any rent to be thereon reserved ; nor from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer ; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent, or for or in respect of any such medicine or medical attendance, or for or in respect of such fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals, dressed and prepared under the roof of any such employer, or for or in respect of any money advanced to such artificer for any such purpose as aforesaid : Provided always, that such stoppage or deduc-

> tion shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.

This section can be divided into three parts. The first part permits the employer to supply, or to contract to supply, such things as medicine, medical attendance, fuel, miners' tools, etc., provender for horses where horses are used in the employment, and victuals prepared under the employer's roof and there consumed, and permits also the letting by the employer to the servant of tenements at a rent to be reserved. The second part of the section enables the employer to make, or to contract to make, stoppages or deductions from wages in regard to all the above matters, and also for the purpose of an advance of money for any of those purposes. The third part of the section provides that, in the case of fuel, miners' tools, and horse provender, the stoppage must not exceed the real and true value of what was supplied, and then goes on to make it a condition precedent to any stoppage or deduction that there should be an agreement or contract in writing signed by such artificer. For the defendants, Mr. Schiller submitted that the effect of this proviso was that only stoppages or deductions for fuel, miners' tools, or horse provender need be in writing signed by the plaintiff. As authority for that proposition, he cited the case of *Chawner* v. *Cummings* (5). That was a case in which the court considered the legality of deductions in the case of knitted gloves. The worker was awarded an agreed gross price per dozen pairs, and from this price was deducted a frame rent, a standing-room charge, a charge for getting materials to the plaintiff buyers, payment to a boy for winding yarn, wear and tear of machinery, and certain other payments. The court, consisting of Lord Denman, C.J., Williams and Whiteman, JJ., held that the so-called deductions were really only a mode of regulating the amount of wages, and nothing more. In effect, what the court decided was that the agreed gross price per dozen pairs included not merely wages but also a sum of money which the worker used to pay for plant, standing-room and various services. This view of the practices employed in the knitting trade in Leicestershire was again put forward and approved in connection with the hosiery trade at Nottingham in the case of *Archer* v. *James* (6). Both Bramwell, B., and Byles, J., pointed out very clearly there that in that type of case what took place was, first, an addition to the wages measured by the piece, and, subsequently, a deduction generally measured by time, and that the result was that there was not a failure to pay wages in current coin, for the real wages were the gross agreed price after making the deductions. While this was the *ratio decidendi* in the case of *Chawner* v. *Cummings* (5), and was sufficient to support the judgment, Lord Denman, C.J., who delivered the judgment of the court in that case, certainly went on to deal with the Truck Act, 1831, s. 23, in the following language, at pp. 324, 325:

> We have already observed that the earlier parts of the Act, up to sect. 23, respect

> the payment of wages in goods or otherwise than in the current coin. But this sect. 23 was relied upon in argument on behalf of the plaintiff, as showing that the statute includes other transactions, and amongst the rest deductions for rent, and that none such are allowable except the contract be in writing, which was not the case here. It is thereby declared that nothing in the said Act contained shall prevent the employer from supplying an artificer with divers articles therein enumerated (not material to the present purpose) " nor from demising to any artificer " " the whole or any part of any tenement at any rent to be thereon reserved ; " nor from making " any stoppage or deduction from the wages of any such artificer for or in respect of any such rent," provided that such stoppage or deduction shall not exceed the " true value of such fuel, materials, tools, implements, hay, corn, and provender " (not including rent), " and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer." Upon the construction of this clause, first, it may be doubted whether there has been any " demise " of any thing " at a rent thereon reserved ; " next, there is nothing to show that there has been a demise " of the whole or any part of any tenement," the conventional phrase " frame rent," which is used in the case, being wholly insufficient to establish that fact ; and, lastly, as has been already noticed, the proviso which requires a contract in writing in order to legalise a stoppage or deduction does not include rent. We are of opinion, therefore, that this section does not affect the question ; and that upon the whole our judgment must be for the defendant.

Here, it is said, is a clear statement by the Court of Queen's Bench as far back as 1846 that the proviso which requires a contract in writing in order to legalise a stoppage or deduction does not include rent, and, if that be the case, the provision of medicine and medical attendance and the provision of victuals prepared under the roof of the employer and there consumed are similarly matters in respect of which deductions or stoppages can be made without the necessity of a contract in writing signed by the servant. Moreover, it was said that the case of *Archer* v. *James* (6) specifically noticed and approved the decision of the court in *Chawner* v. *Cummings* (5) (per Bramwell, B., at p. 101). In the first place, it will be seen that this passage in the judgment in *Chawner* v *Cummings* (5) was *obiter* in a double sense of the word, for, if the court were right in its analysis of the method of payment adopted in the earlier part of the judgment, then there was no question of a deduction or stoppage from wages at all, for the whole of the real wages, in that event, have been paid in current coin of the realm. It therefore became unnecessary to consider whether there were deductions which could be justified under sect. 23 at all. Still more was it therefore *obiter* to consider the proviso to sect. 23, and to say, as the court did, first of all, that the deductions, though nominally rent, were in fact nothing of the kind, and then to go on and hold that, if they were rent, they were deductions which were not dealt with in that part of the proviso which required a written agreement. In any event, this question has specifically come under review in subsequent cases in which the court has had to decide whether or not all the deductions permitted by sect. 23 needed a written agreement to make them legal and valid, and both in the case of *Pillar* v. *Llynvi Coal & Iron Co., Ltd.* (7) and again in the case of *Cutts* v. *Ward* (8) the court held that a written agreement was essential to the validity of deductions in respect of medicine and medical attendance and rent, and no distinction can, of course, be drawn for this purpose between the provision of medicine and medical attendance and the payment of rent and victuals. In the case of none of these is the court given jurisdiction to inquire into the real and true value of what was provided. It seems clear to me, therefore, that the ordinary grammatical construction of the proviso must prevail, and that a written agreement signed by the servant is essential to the validity of any of the deductions mentioned in sect. 23.

The next point taken by the defendants was that in fact the agreements as to wages and conditions negotiated between the union, of which the plaintiff was a member, and the association of masters, and which were applied in fact by the defendants at their warehouse, constituted an agreement signed by the plaintiff. In fact some of these agreements were put in and proved to have been signed by Mr. Jones as an officer of the plaintiff's union, and it was contended by the defendants that the signature on behalf of a servant was a sufficient compliance with the Act. In this connection, my attention was drawn to a decision in *Re Whitley Partners, Ltd.* (9), where it was held that, unless an Act provided otherwise in clear terms, signature by an authorised agent on behalf of a person was signature by that person. Whether this proposition applies to the signature of a workman to an agreement under the Truck Act, 1831, s. 23, is, I think, a matter of some doubt. The whole scope of the Truck Acts contemplated, it may well be said, that deductions should not be made from a man's pay except by his consent given personally in circumstances of some formality. It is, however, unnecessary for me to decide this question, as there was no evidence before me that the defendants were really parties to any of these agreements. They were, it is true, signed by the official of the union, and also signed by the association of masters, but the evidence was that the defendants refused to negotiate with the trade union direct, and insisted on all negotiations taking place between themselves and their own men. There was therefore no evidence before me that the defendants were themselves a party to these printed agreements, even though they voluntarily applied their terms and conditions to their servants.

There remains only the question as to what period of limitation is applicable to the claim. On behalf of the plaintiff, it was urged that this was a debt on a specialty, just as the claims for calls on shares in *Cork & Bandon Ry. Co.* v. *Goode* (10) were held to be a debt upon a specialty. There is, I think, no doubt that this claim lies in debt, and would formerly have been framed in one of the common *indebitatus* counts. In fact, it is a claim for work done for the defendant at his request, and, if contested, the plea could have been "never indebted." This, I think, is clear from the words of sect. 3 of the Act of 1831, which entitles the plaintiff to recover "wages earned" in so far as they were not paid in the current coin of the realm. Then comes the question: Is it a debt upon a specialty? If it is, then it is an action which, as stated in the Civil Procedure Act, 1833, s. 3

> shall be commenced and sued within the time and limitation hereinafter expressed,

> and not after; that is to say, the said actions of debt . . . upon any bond or other specialty . . . within 20 years after the cause of such actions or suits, but not after.

It is not every right of action conferred by a statute that can be called an action for debt upon a specialty, but this action is clearly within one of the tests laid down by Jervis, C.J., in *Cork & Bandon Ry. Co.* v. *Goode* (10): "but for the Act of Parliament this action could not be brought by the plaintiff against the defendants." In that case, once the plaintiff had established that the defendant was a shareholder, and that a call had been made, the statute, and the statute alone, attached the liability to the defendant. Similarly here, the plaintiff, once he establishes that he is a labourer within the terms of the Act, has only to establish the matters set out in sects. 3 and 4 of the Act, and the liability is attached to the defendants. This is clearly laid down by Slesser, L.J., in *Kenyon* v. *Darwen Cotton Manufacturing Co., Ltd.* (11), at p. 206:

> Moreover, by sect. 3 of the 1831 Act, there being an obligation actually to pay the wages in such coin of the realm, every payment in respect of such wages otherwise than in the current coin of the realm being declared illegal, null and void, it follows that both the contract and the payment (in so far as it was otherwise than in coin) were alike ineffectual. On this finding, sect. 4 of the 1831 Act comes into operation, and the plaintiff, by statute, became entitled to recover so much of her wages as had been actually paid not in current coin. Her claim therefore succeeds.

This is not, therefore, a case where the Act merely enables the plaintiff to sue on a contract or a cause of action *dehors* the statute. The distinction is well-illustrated in the case of *Gutsell* v. *Reeve* (12), where Lord Wright, M.R. after a careful examination of *Cork & Bandon Ry. Co.* v. *Goode* (10), distinguishes that case from the facts then under discussion. Those facts were that the plaintiff had, in breach of the Agricultural Wages (Regulation) Act, 1924, been paid less than the minimum wages prescribed by law under that Act. Under that Act, no such right of action was given as is given under the Truck Act, 1831. The employer who paid less than the minimum rate was liable on summary conviction to the payment of a fine, and in addition could be ordered by a court of summary jurisdiction to pay the shortage for a period of six months prior to the information. In certain circumstances, he could be ordered by the same court to pay the shortage over eighteen months. In the case in question, the plaintiff pursued neither of these remedies, but relied on sect. 7 (9) of that Act:

> The powers given by this section for the recovery of sums due from an employer to a worker shall not be in derogation of any right of the worker to recover such sums by civil proceedings.

In the course of his judgment, Lord Wright, M.R. said, at p. 283:

> It is not contended that the whole agreement, or the whole employment, is to be abrogated and swept aside. If that is the true position, then I think it is clear that the matter stands outside the ruling of *Cork & Bandon Ry. Co.* v. *Goode* (10).

That passage shows how different that case was from this one, where the whole contract is swept aside. In the result, therefore, it was held by the court in that case that the claim was upon a contract of employment, and not a mere claim upon a statute. It would appear, therefore, that in that case the claim was not even in debt, still less in debt upon a statute. Similarly, *Aylott* v. *West Ham Corporation* (13) was an action which could only have been brought after the passing of the Local Government Emergency Provisions Act, 1916. All that that Act did, however, was to enable a local authority to pay their servants who had left their employment in order to join His Majesty's Forces. Without an Act of Parliament, such payment would have been *ultra vires* the local authority. The action, nevertheless, was an action upon a promise made after the passing of the Act, and which would not have been a binding promise but for the Act. In the case before me, it is, within the meaning of those cases, only necessary for me to look at the statute in order to find the liability, and, in my view, therefore, the plaintiff is right in saying that this claim is for debt upon a specialty—namely, the Act of Parliament, the Truck Act, 1831. Incidentally, this disposes of the defendants' submission that the plaintiff's claim was in the nature of " an action for penalties, damages or sums of money given to the party grieved by any statute now or hereinafter to be in force," and that therefore the appropriate period was 2 years. At first sight, the above words " sums of money given to the party grieved by any statute " would seem to be a fair description of the plaintiff's rights in this action, but these words have been defined by the Court of Appeal in *Thomson* v. *Clanmorris* (*Lord*) (14) to mean sums of money given by way of penalty or punishment, not by way of compensation to the person injured, although he might put some of it in his pocket : see per Sir Nathaniel Lindley, M.R., at p. 725. What is done by the Truck Act, 1831, ss. 3, 4, is not to impose penalties, but to wipe out payments of wages made otherwise than in current coin of the realm, and to enable the recipient of such wages to recover his earnings in money. From time to time, in the course of the case, the defendants endeavoured to reinforce their arguments by submitting that it was the duty of the court to treat the Truck Acts as penal legislation, and therefore to construe them strictly, giving the benefit of any doubt to the defendants. In the circumstances of this case, it is not surprising that a submission of this kind should be made, but I have not thought myself at liberty to construe the relevant statutory provisions in a narrow sense, or so as to limit their scope. It appears to me that, in passing the Truck Acts in their present form, Parliament, in order to prevent the abuses to which certain practices had led, struck at the practices and abolished them, except as regards those cases where they still permitted them, and even then subject to the safeguards which Parliament imposed. This view of this legislation was pronounced by Bramwell, B., and Byles, J., in *Archer* v. *James* (6). The Court of Appeal appear to have taken the same view of this legislation in *Kenyon* v. *Darwen Cotton Manufacturing Co., Ltd.* (11), following the opinion of the House of Lords in *Penman* v. *Fife Coal Co., Ltd.* (15). In *Kenyon* v. *Darwen Cotton Manufacturing Co., Ltd.* (11), the practices pronounced illegal had no trace of oppression. I have therefore thought it right to endeavour to construe the statutory provisions concerned according to their ordinary and plain meaning, without endeavouring either to extend or to diminish their scope. In the result, therefore, there must be judgment for the plaintiff for the amount claimed with costs.

Judgment for the plaintiff for £397 10s. with costs.

Solicitors: *Corbin, Greener & Cook* (for the plaintiff); *J. N. Mason & Co.* (for the defendants.) A

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

PHILIPS *v.* WILLIAM WHITELEY, LTD. B

[King's Bench Division (Goddard, J.), **January 25, 26, 28, 1938.**]

Negligence—Degree of care required—Jeweller undertaking minor surgical operation often done by jewellers—Ear-piercing—Sterilisation.

The plaintiff, requiring her ears to be pierced so that she could wear ear-rings, approached the defendants, who arranged with C., who was a jeweller, to do this for them at their premises. C., before he set out for the defendants' establishment, placed his instrument in a flame and washed his hands, and, upon arrival there, dipped both the instrument and his fingers into a glass of lysol before he pierced the ear. On the following day, the plaintiff entered a nursing-home for the purpose of undergoing a severe operation, and some 13 days later, after she had experienced some pain in the neck, an abscess formed there, owing to the entry of infection into the hole that had been pierced in the ear:— C D

Held: (i) a jeweller is not bound to take the same precautions as a surgeon would take, and, upon the facts, C. had taken all reasonable precautions.

(ii) it was not proved that the infection entered the ear at the time when C. pierced it. E

[**EDITORIAL NOTE.** It will be noticed that it has long been customary for jewellers to pierce women's ears. When a jeweller undertakes what is in effect a minor surgical operation, he is not expected to take all those precautions which would be taken by a surgeon. It is sufficient that he takes the usual precautions that have been thought by jewellers to be necessary when carrying out the operation. F

As to Degree of Care Ordinarily Required, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571-574, paras. 825, 826; and for Cases, see DIGEST, Vol. 36, pp. 16-18, Nos. 68-79.]

Action for damages for the negligence of the defendants' agent in performing the piercing of the plaintiff's ears. The facts are fully stated in the judgment. G

W. Russell Lawrence for the plaintiff.

Maxwell Fyfe, K.C., and *W. A. Fearnley-Whittingstall* for the defendants.

H

Goddard, J.: I reserved judgment in this case the other day, because, although the issues are quite simple, it raised a point of some importance, and I also wanted to have an opportunity of carefully considering the excellent argument of Mr. Russell Lawrence put forward on behalf of the plaintiff.

The facts of the case are these. Mrs. Philips, the plaintiff, went to Whiteley's jewellery department and made an appointment for another day, on which her ears were to be pierced so that she could wear ear-rings. Whiteleys do not have anybody in their service who pierces ears, but they make an arrangement with another firm of jewellers, Messrs. Ellis, who have a man in their service, a Mr. Couzens, and Ellis's sub-contract, if I may use that expression, with Whiteleys for doing this operation. On the day for which the appointment had been made—namely, Jan. 14—at mid-day, Mrs. Philips went to Whiteleys. Mr. Couzens, not yet having arrived, was telephoned for, and arrived in a short time. At any rate he must have come very quickly, because he got there from Notting Hill Gate in about a quarter of an hour. He then proceeded to pierce Mrs. Philips' ears, using an instrument which he brought with him. A glass of water was brought into the room; Mrs. Philips does not remember that it was used, or what the purpose of it was, but as a matter of fact I find on the evidence that Mr. Couzens put into it some lysol, which is a disinfectant, and that he put his fingers into the disinfectant before he actually pierced the ears.

Mrs. Philips was about to enter a nursing-home for the purpose of undergoing a severe operation for the removal of the gall bladder, and her object in having her ears pierced at that time was that she thought that the sleeper-rings, as they are called—plain gold rings which have to be put into the ear after piercing to keep the ear from closing up—were somewhat unsightly, and that she would get over the wearing of these rings while she was in the nursing-home, so that when she came out of the nursing-home she would no longer have to wear those, and she could wear the ordinary ear-rings. There does not seem to have been any particular reason why she should not have done that, although she did not tell the surgeon that she had had it done; but the surgeon tells me that he does not think that there was any particular risk attached to this matter.

Some days after the major operation, Mrs. Philips says that there was some irritation and inflammation of the left ear. I think that both ears were slightly inflamed, and the nurse who was in charge of her, of course, knew of it, and said that she thought it was nothing more than what one might expect if there had been a puncturing or pricking of the ear. However, about 10 or 11 days after the major operation—that is to say, about 12 or 13 days after the piercing of the ear—Mrs. Philips found that she was getting some pain in the neck. We know now that it was due to an infected gland, and that an abscess was formed. She did not tell her surgeon at the time, because she was anxious to leave the home, and she thought that she would be kept in the home longer if she did tell him. When she got home, however, she had to have her surgeon in attendance. She had taken a nurse with her. It is quite obvious that there was a bad infection of the neck. She suffered a great deal of pain, I have no doubt, and finally the abscess had to be opened and drained. The operation was obviously very skilfully done. It left a small scar, but it was only a very small scar. No doubt it is annoying to any woman to have a scar of that sort in the neck, but it is so small that I hope that Mrs. Philips will soon be accustomed to it, and I think that she can remain certain that it in no way detracts from her appearance. Now she brings this action against Messrs. Whiteley, and she has to prove two things. She has to prove, first of all, that the operation was negligently performed, improperly performed, that all reasonable precautions were neglected, and, secondly, she has to prove that the abscess which formed in her neck, and which no one doubts was due to some infection entering the wound at some time, was due to that negligence, if she can establish that there was negligence. It is quite obvious that it is a very difficult thing for her to prove, and, however much I may sympathise with her, I regret to say that I cannot find that she has proved either of those matters.

In the first place, in support of the allegation of negligence, it is said that Mr. Couzens did not render sterile the piercing instrument that he used. Mr. Couzens has told me, and I accept his evidence, two things. First, he has told me that this operation of piercing the ear, which, of course, is in itself a small matter, has been done by him over the last 10 years, and he says that he thinks the average is about 150 people a year. It is one of those little things of every-day life that are done by jewellers; and one knows (though there has been no actual evidence about it, I think I am entitled to use my own knowledge of the world, sitting as though I were a jury) that jewellers do this operation, and have done for a very long time, and that it is only by a piece of what may be called extremely bad luck that anything goes wrong, just in the same way as when one is out for a walk in the country and inflicts on oneself a punctured wound by a piece of barbed wire, or a thorn, or a splinter of some sort. One may do it a hundred times with no ill-effects to oneself, and on the hundred-and-first time tetanus may supervene.

In this case, the first thing that I have to consider is the standard of care demanded from Mr. Couzens—or, I should say, from Whiteleys, because Whiteleys were the people who undertook to do this piercing. It is not easy in any case to lay down a particular canon or standard by which the care can be judged, but, while it is admitted here, and admitted on all hands, that Mr. Couzens did not use the same precautions of procuring an aseptic condition of his instruments as a doctor or a surgeon would use, I do not think that he could be called upon to use that degree of care. Whiteleys have to see that whoever they employ for the operation uses the standard of care and skill that may be expected from a jeweller, and, of course, if the operation is negligently performed—if, for instance, a wholly unsuitable instrument were used, so that the ear was badly torn, or something of that sort happened—undoubtedly they would be liable. So, too, if they did not take that degree of care to see that the instruments were clean which one would expect a person of the training and the standing of a jeweller to use. To say, however, that a jeweller warrants or undertakes that he will use instruments which have the degree of surgical cleanliness that a surgeon brings about when he is going to perform a serious operation, or indeed any operation, is, I think, putting the matter too high. The doctors all seem to agree in this case that, if a lady went to a surgeon for the piercing of her ears, he would render his instruments sterile. After all, however, aseptic surgery is a thing of very modern growth. As anybody who has read the life of Lord Lister or the history of medicine in the last fifty or sixty years knows, it is not so many years ago that the best surgeon in the land knew nothing about even antiseptic surgery. Then antiseptic surgery was introduced, and that was followed by aseptic surgery. I do not think that a jeweller holds himself out as a surgeon or professes that he is going to conduct the operation of piercing a lady's ears by means of aseptic surgery, about which it is not to be supposed that he knows anything.

If a person wants to ensure that the operation of piercing her ears is going to be carried out with that proportion of skill and so forth that a Fellow of the Royal College of Surgeons would use, she must go to a surgeon. If she goes to a jeweller, she must expect that he will carry it out in the way that one would expect a jeweller to carry it out. One would expect that he would wash his instruments. One would expect that he would take some means of disinfecting his instrument, just in the same way as one knows that the ordinary layman, when he is going to use a needle to prick a blister or prick a little gathering on a finger, generally takes the precaution to put the needle in a flame, as I think Mr. Couzens did. I accept the evidence of Mr. Couzens as to what he says he did on this occasion—how he put his instrument in a flame before he left his shop, and how he washed his hands, and so forth. I think that he did. I see no reason to suppose that he is not telling me the absolute truth when he says what he did, and, as Dr. Pritchard, who holds the very high qualification of a Fellow of the Royal College of Physicians, said, for all practical purposes that is enough. That is to say, for the ordinary every-day matters that would be regarded as enough. It is not a degree of surgical cleanliness, which is a very different thing from ordinary cleanliness. It is not the cleanliness which a doctor would insist upon, because, as I say, Mr. Couzens is not a doctor. He was known not to be a doctor. One does not go to a jeweller to get one's ears attended to if one requires to have a doctor in attendance to do it. If one wants a doctor in attendance, one goes to his consulting room or one has him come to see one. I do not see any ground here for holding that Mr. Couzens was negligent in the way in which he performed this operation. It might be better, and I think that it probably would, if he boiled his instrument beforehand at his place, or if he took a spirit lamp with him and boiled his instrument at the time, but in view of the medical evidence, the evidence of Dr. Pritchard, which I accept, I see no ground for holding that Mr. Couzens departed from the standard of care which you would expect that a man of his position and his training, being what he held himself out to be, was required to possess. Therefore, the charge of negligence fails.

Even if I am wrong in that, and even if another court were to take the view that a person who undertakes to pierce an ear is bound, although he A
holds himself out to be no more than a jeweller, to take all the precautions that a trained surgeon would take, I am quite unable, on the evidence, to find that the abscess from which Mrs. Philips suffered was due to any action of Mr. Couzens. Of course, it took place because she had her ear pierced, but as to when the germ, the staphylococcus B
or whatever it be, had entered the wound and caused the abscess, it is quite uncertain. I paid great attention to, and was much impressed with, the evidence addressed to me, and particularly to the evidence of Mr. Jordan, who has recently become a Fellow of the College, and evidently gave his evidence carefully. He did not put it C
higher than that he thought, or that it was possible, that it was a slow-growing infection, that the staphylococcus (both the doctors seemed to agree that it was a staphylococcal infection, and not a streptococcal infection) might have entered the ear at the time of the piercing (in fact each of them thinks it is more probable that it did), and that it D
might have been due to the state of the needle. At other times, however, as I have said, Mr. Couzens carried out these operations in exactly the same way, used exactly the same precautions—or, if you like, lack of precautions—for ten years, and he had done over a thousand of these earpiercings, and never had anything of this sort happen before. The E
fact that the abscess did not show itself, that there was nothing to raise the suspicion of the nurse in the nursing-home, or that of the doctor who was attending the lady and seeing her after this operation, almost daily, if not daily, up to the time she left the home, and that nothing occurred until something like a fortnight after the piercing, makes it F
exceedingly difficult for me, sitting as a jury, to say that the abscess was caused by that staphylococcus entering the ear at the time when Mr. Couzens pierced it.

No one suggests that, except for the lack of a complete sterilisation, Mr. Couzens did anything wrong that day, that he made an unnecessarily G
large wound. The fact is that, after the piercing has taken place, the sleeper-rings have to be put into the ears. They have to be moved from time to time to prevent the hole from closing, to allow the skin to grow over the tissue which had been pierced, but without filling up the hole, and, of course, if that sort of thing is done, it must keep what H
I may call the inner surface of the puncture to some extent raw. At any rate, the staphylococcus did get in, but there seems to be no doubt, and really I think no difference of opinion between the medical witnesses who were called here, that, generally speaking, if the staphylococcus did get in from the needle on the day on which the piercing

operation was performed, it would in all probability have shown itself at a much earlier time.

Having heard all these medical witnesses, I come to the conclusion that it was much more likely that the infection got into the ear at some later period, and after the piercing, and that it was not due, therefore, A to any dirty needle. I think that the evidence is quite inconclusive, or quite insufficient, to enable me to say that that abscess was caused by the use of a dirty needle on that day. It is quite insufficient to enable me to say when the staphylococcus entered Mrs. Philips' ear, and she has to prove it. The defendants have not to prove that it did not B happen on that particular day. The law is that Mrs. Philips, the complaining person, has to prove it, and I feel that, if I were to give her judgment, and were to hold that she had proved that the abscess from which she suffered was caused by what happened on the day when her ear was pierced, and was due to the dirty condition of the instrument C or the actual treatment which she received on that day, I should be allowing the sympathy which we must naturally feel for her to get the better of my judgment. The result is that the action fails, and is dismissed with costs.

Judgment for the defendants with costs.

D Solicitors : *Harris, Chetham & Cohen* (for the plaintiff) ; *Wm. Easton & Sons* (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

E

KAWASAKI KISEN KABUSHIKI KAISHA v. BANTHAM S.S. CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), **February 2, 3, 1938.**]

F *Shipping — Charterparty — Time charter — Hire — Payment in advance — "Punctual"—Notice of readiness to load.*

A charter-party provided that the charterer should pay for the use and hire of the ship 3*s.* 9*d.* per ton deadweight per calendar month, commencing from the day of her delivery, payment to be made in London in cash monthly in advance, and made provision for day-to-day payments for the last half-month. Delivery was to count from 7 a.m. on G the working day following that on which written notice of readiness to load had been given before 4 p.m., but, if required by charterers, the loading was to commence at once, such time to count as hire. The ship arrived at the port of delivery on the morning of Apr. 13, 1937, and the charterers at once sent an expert on board to certify the amount of bunkers and fresh water on board, and to pass the vessel as fit to load. H The certificate was given at 3 p.m. on Apr. 13, and loading then commenced. On Apr. 15, notice of readiness to load was given, and in the afternoon of that day the London agents of the charterers tendered a cheque for the first month's hire, but this was refused, on the ground that it was out of time, and the vessel was withdrawn from the service of the charterers. It was contended that the hire did not become due until the afternoon of Apr. 16, being the day after notice of readiness to load had been given, and by that time a tender had been made. On the other hand, it was contended that the hire became due at the moment of delivery, since loading then commenced :—

Held : (i) since the amount of the hire was dependent on the deadweight capacity, the payment did not become due until that was communicated by the owners to the charterers.

(ii) the delivery of the ship took place on Apr. 13 at 3 p.m. when the loading was commenced.

(iii) the provision for payment in advance applied to the first month A of the hire, and "punctual payment" in the present case meant that the payment should be made as soon as the owners had informed the charterers of the deadweight capacity of the ship.

[**EDITORIAL NOTE.** This case disposes of such uncertainty as may have existed concerning the construction of the term "punctual payment" in advance, in so far as it applies to the first month of the term of a lease or a hiring. It was argued that B the first monthly payment might be made at any time during the month, but this contention was not accepted, and payment must be made as soon as the term commences, or, in cases where the amount of the hire is the subject of calculation, as soon as it can be determined. The case also considers whether a notice of readiness to load is necessary in a case where loading has, with the consent of all parties, commenced before the notice was given, and how far the time when such notice is C given in such circumstances determines the time from which the hire shall be calculated.

As to Time Charters, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 104, 105, para. 183 ; and for Cases, see DIGEST, Vol. 41, pp. 356-358, Nos. 2051-2073.]

Cases referred to :

(1) *Makin* v. *Watkinson* (1870), L.R. 6 Exch. 25 ; 31 Digest 316, *4582* ; 40 D L.J. Ex. 33 ; 23 L.T. 592.

(2) *Vyse* v. *Wakefield* (1840), 6 M. & W. 442 ; 29 Digest 364, *2938* ; 9 L.J. Ex. 274 ; affd., 7 M. & W. 126.

(3) *Nova Scotia Steel Co.* v. *Sutherland S.S. Co.* (1899), 5 Com. Cas. 106 ; 41 Digest 363, *2111*.

(4) *Budd & Co., Ltd.* v. *Johnson, Englehart & Co., Ltd.* (1920), 2 Ll.L.R. 27. E

(5) *Maclaine* v. *Gatty*, [1921] 1 A.C. 376 ; 12 Digest 451, *3654* ; 90 L.J.P.C. 73 ; 124 L.T. 385.

Appeal by way of case stated from a decision of two arbitrators and an umpire who decided that the respondents, the owners, were not entitled to withdraw their ship, the Nailsea Meadow, from work under F a time charterparty dated June 2, 1936, and made between the claimants and themselves.

A. T. Miller, K.C., and *C. T. Miller* for the owners.

Sir Robert Aske, K.C., and *W. L. McNair* for the charterers.

G

Branson, J. : The facts of this case for the purposes of my judgment can be shortly stated as follows. Clause 5 of the case sets out the material parts of the charterparty under which it was agreed that the ship, "estimated about 8,950 tons deadweight capacity . . . actual deadweight and cubic to be ascertained on delivery from builders' yard," H was to "proceed across the Atlantic in ballast to port of delivery," which, by a subsequent arrangement, became the port of Houston in Texas. The charterparty went on further to provide that :

> The said owners agree to let and the said charterers agree to hire the said vessel from the time of delivery for 12 calendar months.

Clause 4 of the charterparty provided :

> That the charterers shall pay for the use and hire of the said vessel 3*s*. 9*d*. per ton on deadweight as ascertained on delivery from builders' yard, British sterling per calendar month, commencing on and from the day of her delivery as aforesaid and at and after the same rate for any part of a month hire to continue until the hour of the day of her redelivery.

A Then cl. 5 provided :

> Payment of the said hire to be made in London in cash monthly, in advance, and for the last half-month, or part of same, the approximate amount of hire and should same not cover the actual time, hire is to be paid for the balance day by day as it becomes due, if so required by the owners, unless bank guarantee or deposit is made by the charterers, otherwise, failing the punctual and regular payment of hire or bank guarantee . . . the owners shall be at liberty to withdraw the vessel from B the service of the charterers.

The last sentence of that clause reads :

> Delivery to count from 7 a.m. on the working day following that on which written notice has been given before 4 p.m., but if required by charterers, loading to commence at once, such time to count as hire.

C The vessel arrived at Houston on the morning of Tuesday, Apr. 13, 1937, and, at the request of the charterers' agents at Houston, a Captain Wynne attended on board for the purpose of certifying the amount of bunkers and fresh water on board, and of passing the vessel as fit to load. The certificate of the amount of bunkers and water on board was necessary because the charterers had agreed to pay for such amounts D as were found to be on board the ship when she was handed over, and certificates were given certifying the ship as fit to load, and certifying the total quantities of fuel oil and water on board. The special case finds in cl. 10 :

> At the same time as the said certificate of fitness to load was issued, Mr. S. A. E Dunlap of Texas Transport accepted the said vessel on behalf of the claimants, and requested the captain of the said vessel to commence loading at once, and agreed with the captain that the said vessel should be considered as having been delivered at 3 p.m. on Apr. 13.

That having been done, loading commenced at 3 p.m. on Apr. 13. The contention of the owners is that at that moment the ship had been F delivered and hire had begun to run. No payment was made in respect of the chartered hire of the ship until the afternoon of Apr. 15, and at that time the London agents of the charterers tendered a cheque for the first month's chartered hire less an amount of £450 which had to be deducted by reason of the fact that the ship went to Houston instead of G to the original port which was specified in the charterparty, and as to which no question arises. That was refused, upon the ground that it was out of time, and that the owners intended to, and in fact then and there did, withdraw the vessel from the service of the charterers. The question is whether, in those circumstances, they were entitled so to H withdraw her. The arbitrators have found that they were not, and, though they have stated the facts very completely, they have not stated, as indeed there was no need that they should state, the grounds upon which they have come to the conclusion that the owners were not entitled to withdraw the ship.

The way the case is put on behalf of the owners is this. First of all, it is said that delivery of the ship was taken at 3 p.m. on Apr. 13, and it is said that under the charterparty the first month's hire became due in advance, and, therefore, should have been paid before delivery was taken, and that, it not having been paid before delivery was taken, the charterers had failed in the punctual and regular payment of hire within the meaning of cl. 5, and, consequently, that the owners were at liberty to withdraw the vessel from the service of the charterers.

The objections taken by the charterers to the case so put forward are, first, that, under the true construction of cl. 5, " delivery " within the meaning of the charterparty does not take place until 7 a.m. upon the working day following that upon which a notice of readiness is given, and, as in this case no notice of readiness was given until Apr. 15, that payment of the chartered hire did not become due until 2 p.m. in London upon Apr. 16, and by that time a tender had been made. It is also said that the clause in the charterparty relating to punctual and regular payment has no application to the first month's payment of hire. It is also said that, when one finds a word like " punctual " in a commercial document, it does not mean " punctual," but something more elastic, something giving an option to pay within two or three days of the named date. Finally, on behalf of the charterers, it is said that, upon the true construction of this charterparty, the obligation to pay hire could not arise, and did not arise, until the owners had informed the charterers of the amount of the actual deadweight, which was to be ascertained upon delivery from the builders' yard. That is put upon the ground that, although there is no such provision in the charterparty, it follows by necessary implication, because, until the owners have informed the charterers of the deadweight capacity, it is impossible for the charterers to know how much they have to pay, the amount which they have to pay being 3*s*. 9*d*. per ton on the deadweight, as ascertained on delivery from the builders' yard.

As, in my view, the last point is really the point which is decisive of this case, I propose to deal with it first. The authority upon which I am asked to imply into this charterparty a term that payment is not to become due until that information has been given to the charterers is the case of *Makin* v. *Watkinson* (1). That case arose upon a question between a lessor and a lessee. There was a covenant in the lease by the lessor to keep in repair the main walls, main timbers, and roofs of the demised premises. The court held in that case that there must be implied into that contract a term that the obligation to repair could arise only after notice had been given that repair was needed. The grounds upon which the court made that implication have a perfectly general application to all contracts, as it seems to me, and the application is in no way confined to contracts as between landlord and tenant. It is expressed by CHANNELL, B., who, after referring to the case of *Vyse* v. *Wakefield* (2), says, at p. 27 :

> [It] is, to some extent, an authority, for it warrants the proposition that, when

> a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men, and intended what was reasonable.

BRAMWELL, B., later on in the same case says, at p. 30 :

> If we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary.

It is said that this is not a case in which any implication of an obligation to give notice is necessary for the proper fulfilment of the contract. It appears to me that, if the parties are standing upon their strict rights, there must be an obligation upon the owners to give to the charterers the actual deadweight which was ascertained on delivery from the builders' yard before the charterers can be asked to make out a cheque, because the amount for which they have to make out their cheque is, and can only be, ascertained on the basis of the knowledge of the actual deadweight. It is said that there is no need to imply a term that the owners should give that information before their right arises to receive the money, because there are other ways in which the charterers might have found out what the deadweight capacity was. I do not think that, in looking at a contract of this kind in order to see what is the fair implication to be made, one can have regard to such possibilities as that an application to the builders by the charterers might have led to discovery of this figure, or that, when Captain Wynne went on board, he might have asked to see the deadweight scale and have ascertained it for himself. I think that there must be implied into this contract an obligation upon the owners to inform the charterers of that which was within their knowledge and not within the knowledge of the charterers—namely, the correct amount of the deadweight capacity—in order to enable the charterers to put themselves into a position to discharge their obligation to pay the chartered hire. No such communication was made until after the date which the owners rely upon as the date when they were entitled to withdraw the ship from the service of the charterers, and upon that ground I think that this award must be supported.

A good deal of argument has been directed to the other points in the case, and I think that it is only right, therefore, although I think that the point with which I have already dealt is sufficient to decide the case, that I should express my views upon the other matters which have been argued before me. With regard to these points, the first to be dealt with is the argument that, notwithstanding what took place on Apr. 13 at Houston—that is to say, notwithstanding that the agent of the charterers asked to have the ship handed over to him, and that the ship was handed over to him, and that loading commenced at 3 p.m. on Apr. 13—by reason of the fact that the Captain concluded that, delivery having been taken, no notice of readiness was required, the period of 12 months provided for by the charter commenced. In my view, it commenced at 3 p.m. on April. 13, and I fail to follow the force of the argument which suggests that, upon the true construction of the last para-

graph of cl. 5 of the charterparty, the period does not commence until 7 o'clock in the morning after the notice of readiness has been given. It seems to me that the words, " but if required by the charterers loading to commence at once, such time to count as hire," are an alternative provided by the charter to the giving of notice. The business of it is that, when the ship arrives, the ship can put upon the charterers the A
obligation to take delivery by giving this notice. They give the notice at 4 p.m., and then, whether the charterers take delivery or not, at 7 a.m. on the next working day the period begins to run. On the other hand, the charterers may be very anxious to get possession of the ship, and then there is the alternative that they can come and ask for it, and, B
if they come and ask for it, it is to be handed over at once, and loading is to commence at once. Then, of course, with the commencement of the loading commences the period of the charter and the obligation to pay chartered hire. The view which has been taken of this case, as it seems to me, leads to a somewhat ridiculous position. The charterers C
say: " The period commences only at 7 a.m. on Apr. 16, because the captain gave us notice only at 3.55 p.m. on Apr. 15." The case finds that the captain gave the notice only because the charterers' agents asked for it, and not because he wanted it. I cannot see that any business man can have any notion that there is any need to give a notice D
of readiness when his ship is already being loaded as hard as it can be by the charterers. That seems to me to be unpractical and absurd. I think, therefore, that, upon the true construction of this charterparty, it provided for the delivery of the ship to commence, if the charterers so wished, before the expiration of a notice of readiness. In this case, they E
took that alternative, and the period of the 12 months commenced at 3 o'clock on Apr. 13.

That being so, the next question is: Is there anything, apart from the question which I have already dealt with, to prevent the obligation to pay hire from arising also upon that day? It is said that the provision F
as to payment of hire in advance does not apply to the first instalment, and in support of that two cases have been cited to me, the case of *Nova Scotia Steel Co.* v. *Sutherland S.S. Co.* (3), which case was decided by BIGHAM, J., as he then was, and the case of *Budd & Co., Ltd.* v. *Johnson, Englehart & Co., Ltd.* (4), which case was decided by ROCHE, J., as he G
then was. No words of mine are needed to emphasise the authority of those two judges in commercial matters. In those cases they had the charterparties before them, and upon those charterparties, weighing one word with another, they came to certain conclusions, and I have another charterparty before me which is not expressed in the same language, H
although here and there one can pick out a word or two of the same kind. It seems to me that it is my duty to construe the charterparty before me looking at the language which is used in it, and not to try to put on to phrases in it a construction which other judges have thought should properly be put on similar phrases in different settings, both of

language and of surrounding circumstances. It is not as if in either of
those cases either of those judges had laid down anything as a general
proposition. They were deciding the individual cases upon the language
used and the collocations in which that language was used. I confess
that I think it would be very unwise, and very improper, to try to con-
A strue this contract as though any particular words which were used in
it must necessarily have the same meaning as those words used in different
settings in different contracts. I prefer to construe this contract treating
it as a document written in English to which the ordinary meanings of
ordinary words must be given. Looked at in that way, one asks one-
B self this question : First of all, what right have I to say that the pro-
visions as to the payment of the hire are not to apply to the first instal-
ment ? Plainly, " payment of the hire to be made in London in cash
monthly " must apply all through. Upon what criterion of construction
can I rely to say that the words " in advance " shall not be equally
C applicable ? It is said that there is some difficulty in paying in advance,
and that there might be a difficulty in having the money ready, because
it is not clear when the ship will arrive. The answer to that again is in
the last paragraph of cl. 5 of the charterparty, which says that, if the
ship is insisting upon delivery commencing, it has to give its notice, and
D then there is from 4 p.m. on the one day until 7 a.m. on the next working
day in which payment in advance can be made. If the other limb of
that sentence is to be operated, then the charterers who are going to ask
for delivery of the ship can go with their money in their hands and pay
it before they take delivery. I see no reason, therefore, for deciding
E that, whereas the provision that payment is to be made in London in
cash should apply, the very next words in the same sentence should not
apply. I think, therefore, that the contract provides for payment in
advance, even of the first instalment.

Then it is said that, even though that may be the case, the provisions
F about liberty to withdraw upon failure to pay punctually and regularly
cannot apply to the first instalment. Again, I fail to see the difficulty.
It is argued, I suppose, that a payment may be made in advance if it is
a payment for the first month's hire, even though it is not made before
the actual moment that the first month commenced. It may be, in a
G sense, in advance if it is paid at the end of the first week or the second
week, because *qua* some part of the payment it is still being paid in
advance. But then one has to look at the particular provisions of the
particular clause which is being construed, and one finds in this clause
provisions which seem to me to emphasise the rigidity of the word
H " punctual " in a manner which makes it impossible to construe it as
loosely as I am urged by the charterers to construe it. I see no reason
for supposing that there was to be more laxity in the first month than
there was to be in the last month, particularly having regard to the fact
that cl. 5 of the charterparty says :

> Payment of said hire to be made in London in cash monthly, in advance, and

> for the last half-month or part of same the approximate amount of hire, and should same not cover the actual time hire is to be paid for the balance day by day as it becomes due.

Therefore, these parties are providing there that, when the charter is coming to an end, and there is an odd length of time still to run, perhaps because the ship is late, or because she has not finished loading, or something of that kind, day by day this hire has to be paid in advance. I find it impossible, in a clause which contains that provision, to say that at the beginning the parties were so careless as to when the money was to be paid in advance that they never intended that any payment in advance should be necessary at all with regard to the first instalment, or that, if it was, they did not mind whether it was paid at the end of the first week or of the second week or of the third week, and, if so, why not at the end of the fourth week, which would make it in arrear. Whatever may be the view on other contracts with different language, I cannot see upon this contract any means of extending the meaning of the word "punctual" in the way I am asked to extend it in the present case. I suffer under the same disability in that respect as did Lord Shaw of Dunfermline in the case of *Maclaine* v. *Gatty* (5), where he said, at p. 393:

> My Lords, my mind cannot comprehend the elasticity of punctuality. I know of no method of construction of a contract by way of contradiction of it.

Therefore, on those grounds, it appears to me that, if these owners had given to the charterers the information with regard to the deadweight capacity which they should have done under the charterparty, and had done that on delivery from the builder's yard, as the charter provides that they should do, they would have been entitled to withdraw the ship, upon the ground that the charterers had failed in their obligations under cl. 5 of the charter, and had given rise to the owners' liberty to withdraw the vessel which that clause confers upon them in the circumstances therein mentioned, but, as I have already said, it appears to me that the failure to let the charterers know what was the deadweight capacity, and the consequent failure to put them in a position to fulfil their obligation to pay in advance, has rendered it impossible for the owners to withdraw the vessel. Therefore, the conclusion of the award as expressed in para. 27 thereof is, I think, correct.

Solicitors: *Ince, Roscoe, Wilson & Glover*, agents for *Allen Pratt & Geldard*, Cardiff (for the respondents, the owners); *Thomas Cooper & Co.* (for the claimants, the charterers).

[*Reported by* Gerald Abrahams, Esq., *Barrister-at-Law.*]

HALE *v.* JENNINGS BROTHERS.

[COURT OF APPEAL (Slesser, Scott and Clauson, L.JJ.), **January 31, 1938.**]

Nuisance—Principle of Rylands v. Fletcher—Chair-o-plane—Detached part of revolving apparatus causing injury—Passenger larking.

A The plaintiff was tenant of a stand on a fair-ground belonging to the defendants. While she was on her stand, a chair, with its occupant, became detached from a chair-o-plane, the property of and operated by the defendants, and severely injured the plaintiff. It was found as a fact that the action was due to the recklessness of the occupant of the chair :—

HELD : the defendants were liable without proof of negligence on B their part, as the principle of *Rylands* v. *Fletcher* (1) applied.

[EDITORIAL NOTE. This case applies the well-known doctrine of *Rylands* v. *Fletcher* (1) to the case of a chair-o-plane, a form of roundabout, where the chairs in which the pleasure-seekers sit are free upon being whirled round at a considerable speed to move outwards and upwards. The real question in the case is whether a machine is dangerous in itself when there is no danger if it is properly used and is C not subject to any latent defect.

FOR THE DOCTRINE IN *Rylands* v. *Fletcher*, see HALSBURY, Hailsham Edn., Vol. 23, pp. 614-622, paras. 865-871, and FOR CASES, see DIGEST, Vol. 36, pp. 187-199, Nos. 311-388.]

Cases referred to :

D (1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311* ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; *affg.* S.C. (1866), L.R. 1 Exch. 265 ; *revsg.* (1865), 3 H. & C. 774.

(2) *Barker* v. *Herbert*, [1911] 2 K.B. 633 ; 36 Digest 197, *374* ; 80 L.J.K.B. 1329 ; 105 L.T. 349.

(3) *Box* v. *Jubb* (1879), 4 Ex.D. 76 ; 36 Digest 198, *379* ; 48 L.J.Q.B. 417 ; E 41 L.T. 97.

(4) *Northwestern Utilities, Ltd.* v. *London Guarantee & Accident Co., Ltd.*, [1936] A.C. 108 ; Digest Supp. ; 105 L.J.P.C. 18 ; 154 L.T. 89.

(5) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L.T. 547 ; 38 Digest 23, *125*.

(6) *Rickards* v. *Lothian*, [1913] A.C. 263 ; 36 Digest 194, *353* ; 82 L.J.P.C. 42 ; 108 L.T. 225.

F (7) *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43 ; 36 Digest 193, *343* ; 88 L.J.K.B. 915 ; 120 L.T. 601.

(8) *Noble* v. *Harrison*, [1926] 2 K.B. 332 ; 36 Digest 189, *316* ; 95 L.J.K.B. 813 ; 135 L.T. 325.

(9) *Blacker* v. *Lake & Elliot, Ltd.* (1912), 106 L.T. 533 ; 36 Digest 56, *353*.

(10) *Smith* v. *Great Western Ry. Co.* (1926), 135 L.T. 112 ; 36 Digest 198, *384*.

G (11) *Nichols* v. *Marsland* (1875), L.R. 10 Exch. 255 ; 36 Digest 197, *376* ; 44 L.J. Ex. 134 ; 33 L.T. 265 ; *affd.* (1876), 2 Ex.D. 1 ; 46 L.J.Q.B. 174 ; 35 L.T. 725.

APPEAL from a decision of His Honour JUDGE BEAZLEY, sitting at Edmonton County Court, dated May 13, 1937, asking that the order of the judge that the plaintiff should pay the defendants' costs should be H set aside, and that judgment should be entered for the plaintiff for damages and costs against the defendants.

At all material times the defendants were the owners of a machine known as a chair-o-plane, which was erected at a fun-fair at Alexandra Park. It was claimed that, as a result of the defendants' negligence, a passenger and a chair were thrown on to the plaintiff, causing her severe injuries. The defendants denied that they were guilty of any negligence, and said that the plaintiff's injuries were not caused or contributed to by any negligence of themselves, their servants or their agents, but were due to the act of a stranger.

The grounds of the appeal were as follow: (i) that the defendants were negligent in the manner set forth in the statement of claim and in particular by allowing the chair-o-plane in question and its attendant machine to work and to be used by the public when at all material times they knew that it was a constant potential danger to persons near by, by reason of its possible wrongful user by occupants of the chairs; (ii) that the said chair-o-plane was at all material times a nuisance; (iii) that the defendants owed a duty to the plaintiff so to use and to permit the use of the said chair-o-plane as not to damage her, and they failed to discharge that duty; (iv) that at all material times the said chair-o-plane constituted a dangerous thing on the premises of the defendants, and they allowed it to escape and damage the plaintiff.

Wilfrid Price for the appellant.

H. R. Boileau for the respondents.

Price: The plaintiff ought to succeed on each of the three grounds argued before the county court judge. The plaintiff should succeed under the rule in *Rylands* v. *Fletcher* (1). The defendants brought upon their land a machine which had heavy loads suspended from the top of it by chains. If they allow it to whirl round at a great speed, it becomes dangerous, and the defendants must be regarded as allowing that at their peril. Further, in the present case, they allowed on the machine a man who to their knowledge was larking about. [The court did not desire counsel to address them on the questions of nuisance or of negligence.] [Counsel referred to *Barker* v. *Herbert* (2), *Musgrove* v. *Pandelis* (7), *Rickards* v. *Lothian* (6)].

Boileau: Whether or not the case comes within the rule in *Rylands* v. *Fletcher* (1) is a question of mixed fact and law. It has been found as a fact by the county court judge that the machine was in a good condition, that the suspension was normal, that the defendants were not negligent in allowing Crampton to ride, were not negligent in not stopping the machine, and that the accident happened because of Crampton's bad behaviour. It has been suggested that this machine is a dangerous thing within the meaning of the rule in *Rylands* v. *Fletcher* (1), but it is clear that it must be a thing inherently or potentially dangerous to come within that rule. The judge had to consider the nature of this machine, its mode of manufacture, and the use made of it, and then ask himself if the machine were likely to cause danger. The question has been decided on the facts in favour of the defendants. The county court judge has found that the defendants have not used their property in such a way as to expose any person to excessive danger, and that the accident would not be regarded by any reasonable person as likely to happen. It must be a question of fact as to whether or not the machine was dangerous, or likely to do damage if it escaped. Also, the county court judge has found that the accident was caused by Crampton, who was a stranger within the meaning of the rule. There are two tests which can be applied. One is control, but the defendants had no control over Crampton except by stopping the machine, and this was done as soon as possible. The other test is whether the event could reasonably be expected. The judge has found that the defendants could not reasonably expect that such an accident as this would occur, and that they could not reasonably be expected to anticipate such a danger. [Counsel referred to *Noble* v. *Harrison* (8), *Blacker* v. *Lake & Elliot, Ltd.* (9), *Box* v. *Jubb* (3), *Rickards* v. *Lothian* (6), *Smith* v. *Great Western Ry. Co.* (10), *Nichols* v. *Marsland* (11).]

Slesser, L.J.: The plaintiff in this case was the owner of a shooting-gallery at the fair-ground at Alexandra Park. She was the tenant of the defendants in respect of the ground on which the shooting-gallery was situated. The defendants were in occupation of adjoining ground, and on that ground they had erected, for the purpose of carrying on their business as amusement proprietors, a chair-o-plane, an apparatus similar to the roundabouts. The principle of it is that it rotates at a considerable speed—namely, five or six revolutions a minute. That rotation creates a centrifugal force, causing the chairs to rise outwards and upwards to the extent of some feet. The attraction of the whole apparatus is that it gives the pleasant feeling of rushing through the air. These rotating chairs are generally open to such members of the public as are in a position to pay for a ride upon them, and it appears from the evidence of Mr. Jennings, and it was accepted as a fact by the county court judge, that there is a lot of fooling about by the people who use these chairs. Mr. Jennings said in his evidence, and the facts of this case are really not in dispute at all, that one might, by swinging a chair round to a certain extent, cause it to become loose. There was other evidence, including that of an expert engineer, who said that he had examined the chairs, and that with normal user they were quite safe. The county court judge has found that this particular chair, at the time of the accident, was in a proper state of repair. We are satisfied that this particular chair was then in a state of proper repair. He says that the chair came off from the S hook which holds upon the D hook. The only cause of the accident that he could suggest was that the bouncing effect would counteract the centrifugal force. A man accused of fooling about denied in evidence that he was fooling about, but other witnesses deposed to the fact that he had been so doing, and that he must have displaced the S hook from the D hook and so let the chair go, and the county court judge has found that the cause of the accident was the folly of Crampton in fooling about. Crampton had been warned on a previous occasion. The county court judge formed the view that the defendants had taken every step to stop his fooling, and, as they could not do so, they had endeavoured altogether to stop the machine. The facts of the case are not really in dispute. The chair having become detached, the plaintiff was injured by having been struck by it, and damages have been awarded by the county court judge at a sum of £300, if the defendants are liable, and there is no dispute about the amount. The question for this court is: Was the county court judge right in law in coming to his decision? The plaintiff in this action has relied upon several causes, but we have thought fit to call upon Mr. Price, for the plaintiff, in respect of only one of them. It may be that we think the decision of the county court judge cannot be impeached as regards his findings of the absence of negligence or of nuisance, but that, on the other ground of her appeal, on what is called the rule in *Rylands* v. *Fletcher* (1), she is entitled to succeed. The rule has been so often stated that it is almost unnecessary to repeat it. The rule is stated in SALMOND ON TORTS, 9th Edn., p. 572:

> The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.

In other words, if the plaintiff can satisfy the court that the occupier has brought upon his land something likely to do damage if it escapes, within the principle as it has been decided in the various cases, it is not necessary for the plaintiff to show any negligence on the part of the defendant. The judge has directed his mind to this question, but, in my opinion, he has not correctly considered the problem which he had to determine upon the facts of this case. In his judgment he quotes *Barker* v. *Herbert* (2), and asks whether the machine that has been erected on the defendant's land is essentially dangerous in itself. The judgment reads:

> In my view, the chair-o-plane was something of an unusual nature, but was not essentially dangerous in itself. It is dangerous, as most structural things are, only if it is not in a state of proper repair, or if passengers on it behave recklessly, as Crampton did.

Mr. Boileau has argued that this was a matter of fact for the county court judge, and, if we had been satisfied that he had properly directed his mind to the facts, it may be that we should have hesitated to interfere with the judgment. These words, however, make it clear that he had not considered the matter. He says it is clear that it is dangerous only if it is not in a proper state of repair, but he must consider, not only the state of repair, but also the state of the machine in motion. It may be that while this machine is rotating laterally, some parts of it, through the action of centrifugal force, will be detached and thrown outwards, although, so far as the apparatus itself is concerned, there has been no negligence at all. There may be some fracture in some part of its metal. There may be some deterioration which no adequate inspection will reveal, which will allow part of this rotating mass of metal to become loose. The question to consider is whether or not the apparatus is essentially dangerous in itself. The second ground he mentioned was that it was not essentially dangerous in itself unless passengers on it behaved recklessly, as Crampton did. There, again, I think that the judge has misdirected himself. The evidence is that the thing was put upon a public ground, and, without casting any reflection upon the persons who desire to enjoy themselves by using it, it is not only intellectual people who enjoy this machine. It may be that children, or grown-up persons occasionally, may be fooling upon this apparatus. We need not speculate upon the point. We have the finding of the judge that there was a good deal of fooling about, and that must mean fooling about on these chairs while persons are on the machine itself. Therefore, in so far as the judge has found that it would be dangerous if persons behaved on it dangerously, as Crampton did, he has found that the machine was dangerous in itself. Many of the people using it may be foolish and there is an invitation to them to sit upon these chairs, and they and others are part of that which constitutes the danger of the apparatus.

The second point which was taken by the respondent was that the authorities go to show that, even where there is an apparatus dangerous in itself, and somebody interferes with it, the question still arises as to whether the damage resulted from the dangerous thing itself or was caused by a stranger over whom the defendant had no control. Mr. Boileau cited *Box* v. *Jubb* (3), and this case shows that, where it can be shown that the actual injury is due to the action of a stranger, and not to the thing itself, there may be no liability. In *Box* v. *Jubb* (3), KELLY, C.B., said, at pp. 78, 79:

> The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible—did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction.

In the present case, however, I think that none of these considerations applies. I think that this man whose act of fooling about on this device caused the damage, so far from being a stranger, had been invited to take part in the amusement, and the machine was under the complete control of the defendants. The evidence shows that, not only had they control, but they also sought to exercise it. Mr. Jennings said that he tried to stop the machine. In the circumstances it does not seem proper to say that the injury was caused by the uncontrolled act of a third person. I think that it is very much within the case of *Rylands* v. *Fletcher* (1), where, it will be remembered, the person who possessed the land was held liable because the contractor in constructing the reservoir had not taken care to block up certain disused shafts which led to a mine below the land, with the result that water broke through some of the shafts and flooded the mine. The defendant in that case was unaware of the existence of the shafts, and was certainly not guilty of any negligence. It seems to me that the judge was wrong in coming to the conclusion that this chair-o-plane was

not an apparatus of an unusually dangerous character in itself. I think
that the proper view is—drawing an inference of fact which we are entitled
to draw from the misdirection of fact on the part of the judge—that it
was inherently dangerous, that it escaped and injured the plaintiff,
and that the defendants are responsible. The damages will therefore
be the amount which the county court judge awarded. A

Scott, L.J.: I agree. The action was brought on three grounds—
namely, the rule in *Rylands* v. *Fletcher* (1), nuisance, and negligence.
The county court judge has found in his judgment that the plaintiff
fails on all three grounds. I agree with him as regards nuisance and B
negligence, but I disagree with him as regards the principle of *Rylands* v.
Fletcher (1). On the other two grounds we have not heard the plaintiff's
counsel, and therefore my observations will be subject to that qualifica-
tion. The principle of *Rylands* v. *Fletcher* (1) is shortly stated in
Salmond on Torts, 9th Edn., p. 572: C

> The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.

That is the broad principle upon which there have been grafted in the
course of time certain well-known exceptions. The fundamental rule of D
the principle is that the liability attaches because of the occupier of land
bringing on to the land something which is likely to cause damage if it
escapes. That leads to another aspect of the matter—namely, that, if the
user of the land is not its natural user, but anything artificial, that also may
bring the principle into operation. In this particular case, the defendant E
was conducting the business of a fun-fair, the essence of which was that he
wanted to attract people to his premises in order that they might amuse
themselves in a spirit of the greatest possible levity with the various devices
which he provided for them. One of the means of amusement was this
so called chair-o-plane, an apparatus rotated by mechanical power. On F
it a number of chairs were hanging by chains from a revolving disc at the
top. They were rotated at a considerable speed, so that the chairs might
by centrifugal force swing outwards and upwards. The exact distance of
the chairs from the rotating apparatus was not given, but I understand
that it was something like 10 ft., possibly more. It was said in evidence G
that the apparatus revolved five or six times a minute. That would mean
a considerable speed when the machine was working at its full rate.
It follows necessarily that that machine was dangerous in the *Rylands*
v. *Fletcher* (1) sense. If anything did escape from it, it was bound to
be dangerous, as the facts of this case show, where a chair got loose and H
fell with its occupant on to the plaintiff, and caused her serious bodily
injuries. One of the exceptions to the rule in *Rylands* v. *Fletcher* (1),
and the only one it is necessary to consider here, is the malicious inter-
vention of a third party, the occupier of the premises having nothing to
do with the escape of the cause of danger, and the third party being

solely responsible for it. It is suggested that that exception covers the present case, on the ground that the occupant of the chair, a Mr. Crampton, was himself the cause of the chair becoming loose by his not sitting in it in the ordinary correct way, and by his pulling neighbouring chairs about, and thus causing an abnormal strain upon the chains of the apparatus, which in turn caused one of the hooks to become detached. In my view, the kind of act so described cannot fall within the principle of the exception at all. That type of exception was considered in the course of the judgment of the Privy Council in *Northwestern Utilities, Ltd.* v. *London Guarantee & Accident Co., Ltd.* (4). The nature of the accident in that case was the escape of a dangerous inflammable gas in a town. I need not trouble about the details of the facts of the case, because I want to cite from the judgment only on this question of exceptions. LORD WRIGHT, delivering the judgment of the court, said at p. 119:

> This form of liability is in many ways analogous to a liability for nuisance, though nuisance is not only different in its historical origin but in its legal character and many of its incidents and applications. But the two causes of action often overlap, and in respect of each of these causes of action the rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers. As an illustration of this well-known doctrine, reference may be made to *Green* v. *Chelsea Waterworks Co.* (5), where LINDLEY, L.J., said of *Rylands* v. *Fletcher* (1): "That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." By the same reasoning the rule has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party, as in *Box* v. *Jubb* (3), which was approved by the Judicial Committee in *Rickards* v. *Lothian* (6); and not to any negligence of the defendants. In *Box* v. *Jubb* (3) the act which caused the escape of the water from the reservoir was a malicious (which their Lordships think means no more than conscious or deliberate) act of a third person.

That seems to me to be appropriate to this question. The behaviour of Crampton in causing the chair to become detached, was in my view just the kind of behaviour which ought to have been anticipated as being a likely act with a percentage of users of the apparatus. People go there in a spirit of fun. Many of them are ignorant, and many of them are wholly unaware of the dangers incidental to playing with the chairs in that sort of way, and they cause a danger that they do not in the least realise. That kind of accident does not come within the exceptions to the rule at all. The apparatus is dangerous within the meaning of the rule because it is intended to be used by that sort of person; and is likely to produce this very danger. I consider that the rule in *Rylands* v. *Fletcher* (1) applies to the facts of this case, because the apparatus was set up by the defendants for the purpose of profit. It was a non-natural user of the land. It was inherently dangerous, and the defendants have to take the risk of any damage which may result from it. For these reasons, I think that the judgment of the county court judge should be reversed.

CLAUSON, L.J.: I agree. I understand counsel for the defendants to agree that it is a non-natural user of land to erect upon it a machine the purpose of which is to whirl heavy objects round in reliance upon the combined stress of the various parts of the structure. Since the defendants put their land to this non-natural user, it becomes necessary to inquire whether the object which they placed upon it was a thing in some cases dangerous and in others likely to cause damage if it escaped. The fact is that the machine which the defendants had erected upon their land was one upon which the persons invited to use it were not under the physical control of the defendants, and these persons were placed in a position in which they were able to interfere with the safe working of the machine, as they interfered in this case, in such a manner as to cause portions of the machine to become detached under the pressure of centrifugal force, with the result that they inflicted damage upon the plaintiff. On these facts, it appears to me clear that, as a matter of law, the defendants must be held responsible for what occurred, upon what has been described as the rule in *Rylands* v. *Fletcher* (1).

Appeal allowed. Judgment to be entered for the plaintiff for £300 *with costs, and payment out to her of* £15 *paid in as security. Leave to appeal refused.*

Solicitors: *Mark Lemon* (for the plaintiff); *Vivash Robinson & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

IN THE ESTATE OF TAYLOR, GOLDIE *v.* ADAM.

[Probate, Divorce and Admiralty Division (Bucknill, J.), **January 25, 26, February 3, 1938.**]

Wills—Revival—Earlier will and codicils—Later will revoking earlier—Final codicil expressly confirming earlier will—Absence of appropriate words of revival—Wills Act, 1837 (*c.* 26), *s.* 22.

The testator made a will in 1929, and three codicils thereto in 1930 and 1931. In 1932, he made a further will, revoking all wills and testamentary writings, and in 1933 he executed a codicil which he described as the fourth codicil to his "last" will of 1929, and confirmed the "said will and the first three codicils thereto." It was not contended that the last codicil revoked the 1932 will, but it was contended that it revived the 1929 will and the three earlier codicils, and that both wills and the four codicils should be admitted to probate:—

Held: the words in the 1933 codicil did not show an intention to revive the 1929 will and the three codicils made thereto, and there ought to be admitted to probate as the last will of the testator the 1932 will and the 1933 codicil, omitting therefrom all reference to the 1929 will and the three codicils thereto.

[EDITORIAL NOTE. It has been said that the testator's intention to revive a previous will must be express, and not implied, but the intention can be gathered from a disposition of the testator's property which is inconsistent with any other intention. The words of the codicil relating to the confirmation of "my said will" are the usual form of words in a document of this kind, and it would not seem right to imply any intention from them unless it were supported by the fact that the dispositions made in the codicil were inconsistent with any view other than that of the revival of the earlier will.

As to Revival of Will, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 575-577, paras. 1145-1149; and for Cases, see DIGEST, Vol. 44, pp. 365-370, Nos. 1979-2034.]

Cases referred to:

(1) *In the Goods of Steele, In the Goods of May, In the Goods of Wilson* (1868), L.R. 1 P. & D. 575; 44 Digest 366, *1995*; 37 L.J.P. & M. 68; 19 L.T. 91.

(2) *Jane* v. *Jane* (1917), 33 T.L.R. 389; 44 Digest 369, *2034*.

(3) *In the Goods of Chilcott*, [1897] P. 223; 44 Digest 369, *2032*; 66 L.J.P. 108; 77 L.T. 372.

(4) *In the Goods of Stedham, In the Goods of Dyke* (1881), 6 P.D. 205; 44 Digest 369, *2028*; 50 L.J.P. 75; 45 L.T. 192.

Probate Action in which the plaintiff, the surviving executor of a will of the testator dated Sept. 11, 1932, claimed that the will and the codicil should be pronounced for, omitting from the codicil all words of reference to an earlier will of the testator dated June 9, 1929, and three codicils thereto, made in 1930 and in 1931. The testator, Daniel Charles Maynard Taylor, died on Jan. 6, 1935, leaving estate of the approximate value of £15,000. The facts are fully stated in the judgment.

R. F. Bayford, K.C., and *R. H. Bayford* for the plaintiff.

H. W. Barnard for the defendants and for the party cited.

Bucknill, J.: The defendant Mr. Adam, and Mr. Hallam, a party cited, claim that the will of Sept. 11, 1932, was revoked by the codicil dated Aug. 12, 1933, which was the last testamentary document executed by the testator. That codicil was in the following terms:

> This is the fourth codicil to the last will and testament of me Daniel Charles Maynard Taylor which will bears date June 9, 1929, whereby I give and bequeath the legacy or sum of £6,000 (duty free) to my friend Dorothy Louise Holt c/o The Midland Bank Limited, 89, Gracechurch Street, London, E.C.1. In all other respects I confirm my said will and the first three codicils thereto.

Mr. Barnard, on behalf of the defendant, said that he would not argue that this last codicil revoked the will of 1932, but he argued that the words of the codicil plainly showed an intention to revive the will of 1929 and the three earlier codicils, and that the court should admit both wills and all four codicils to probate.

The will of 1932 in terms revoked all testamentary wills and writings, and therefore revoked the will of 1929 and the three codicils of 1930 and 1931. There is, in my opinion, a latent ambiguity in the words of the fourth codicil, which refer to the testator's last will dated June 9, 1929, whereas the testator's last will was in fact dated Sept. 11, 1932. Evidence of the real meaning and intention of the testator in making the codicils is therefore admissible. Accordingly, witnesses were called, and various letters and documents were proved, and the following facts were established. Mr. Taylor, who died at the age of 63, was the governing director of a business in Hull. His wife died in 1928, leaving him with one daughter. After his wife's death, Mr. Taylor was in very poor health. He attended personally on rare occasions at the office in Hull, and spent a good deal of his time on board his yacht. Mr. Taylor entrusted his

business and private affairs to Locking & Locking, a firm of solicitors in Hull. At the material time, there were two Mr. Lockings, father and son, partners in the firm. Mr. Locking senior died in 1937, about two years after Mr. Taylor, at the age of 84, and Mr. Locking junior died a month after his father. After his wife's death, Mr. Taylor made several
wills or codicils before the will of 1929. All these documents were prepared A
for him in the office of Locking & Locking, and were preserved in the safe in their office in which clients' wills were kept.

On June 9, 1929, Mr. Taylor made the will which it is now sought to revive. This will did not in terms revoke all earlier wills, but Mr. Locking
senior wrote in red ink across the front of the earlier will "cancelled," B
and inserted the date, but retained the cancelled will in the safe. After due execution, the will of 1929 was also placed in the safe. Under the will of June 9, 1929, Mr. Taylor provided, *inter alia*, that, if his daughter died without issue who attained the age of 21, the sum of £10,000 should
be divided equally between John Hallam and Ernest Adam. On Dec. 1, C
1930, Mr. Taylor executed a codicil to this will, and on Sept. 17, 1931, he executed the second codicil. Three days later he made a third codicil. The second and third codicils were typed at the end or in the folds of the sheet of paper on which the first codicil was typed.

At the time that Mr. Taylor executed this third codicil, he wrote to his D
old friend Mr. Locking senior a letter in which he said that he wished to make a fresh will, and to dispose of the sum of £10,000 in another way, so far as Adam and Hallam were concerned, but nothing further was done about it at that time. About a year later, Mr. Taylor again wrote to
Mr. Locking senior, suggesting alterations to his will for the purpose of E
cancelling his bequest to Mr. Hallam and Mr. Adam. A fresh will was accordingly prepared, in all probability by Mr. Locking senior, who had the sole confidence of Mr. Taylor with regard to his domestic affairs. The main alteration made by this will in the disposition of the testator's
property was to delete the names of Messrs. Hallam and Adam from F
the will.

This will was posted to Mr. Taylor, who brought it to Harrogate and executed it there on Sept. 11, 1932. After Mr. Taylor had executed the will, he handed it in its envelope to a Mr. Verity, and asked him to give
it to Mr. Locking senior. Mr. Verity handed the will in the envelope to G
Mr. Locking junior, and asked him to give it to his father. Mr. Locking senior and Mr. Locking junior are now dead, and it is impossible for the court to receive their account in the witness-box of the subsequent history of the will of 1932. The only evidence placed before me was that this
will was found after Mr. Taylor's death, not in the safe for clients' wills, H
but in Mr. Locking senior's private safe. Moreover, the will of 1929 and the three codicils remained intact in the clients' safe, although they had been specifically revoked, and have not got the word "cancelled" in red ink written across them, such as had been written by Mr. Locking senior in the case of the earlier will of Mr. Taylor. After Mr. Taylor had

made this his last will, he went abroad, and on his return started some heavy litigation, in which Mr. Locking junior acted for him, because it was rather more than Mr. Locking senior could undertake.

On Aug. 12, 1933, Mr. Locking junior with his clerk, Frederick Smith, went to Mr. Taylor's office in Hull, taking with him the sheet of paper on which the three codicils were typed, and probably the sheet of paper on which the 1929 will was typed. He also took with him various papers connected with the litigation. Mr. Locking in the presence of Mr. Taylor dictated to Smith the draft of the fourth codicil, to which I have already referred, and told him to transcribe it on the sheet of paper on which were the three earlier codicils. Mr. Smith did this, and took it back to Mr. Taylor's room. Mr. Locking then read the codicil, out to Mr. Taylor, who duly executed it. Mr. Locking then took the piece of paper back to the offices of Locking & Locking, and it was replaced in the office safe. Mr. Smith proved that on this particular day Mr. Locking senior was not in the office, and attended there very infrequently at this time.

These are the material facts of the case, and the question which the court has to decide is whether the will of 1932 and the fourth codicil should be admitted to probate with the deletion from the fourth codicil of all reference to the 1929 will and three codicils, or whether, in addition to these two documents, the 1929 will and the three earlier codicils should also be admitted to probate.

The will of 1929 and the three codicils executed before the will of 1932 were revoked by the will of 1932, and therefore they cannot be revived by the fourth codicil unless the case falls within the provisions of the Wills Act, 1837, s. 22. The section enacts that:

> No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required and showing an intention to revive the same . . . .

The object of the legislature in passing this section was presumably to put an end to implied revivals. SIR J. P. WILDE in *In the Goods of Steele* (1) said that in his view the legislature meant that the intention to revive should appear on the face of the codicil, either by express words referring to a will as revoked and imparting an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the court with reasonable certainty the existence of the intention to revive the revoked will.

In this case, do the words of the fourth codicil show an intention to revive the will of 1929 and the three codicils? There is nothing on the face of the document, or in the surrounding circumstances, from which the court can infer an intention to revive the revoked will and codicils, save that the codicil refers to them and confirms them. But the will of 1929 was not in fact the last will of the testator, and had in fact been revoked.

On the other hand, the facts seem to me to indicate that the words in the codicil of 1933, referring to the will of 1929 as the last will, and referring to the three codicils, were placed there by mistake, and that the testator never intended to revive them. The words of the 1933 codicil, when interpreted in the light of the surrounding circumstances, do not show an intention to revive the revoked will of 1929 or the three codicils which were all revoked by the will of 1932.

This decision is in accordance with the decision of Sir Samuel Evans, P., in *Jane* v. *Jane* (2), in which the cardinal facts were similar to the facts in this case. Sir Samuel Evans, P., in that case based his decision on the judgment of Sir J. P. Wilde, in the case of *In the Goods of Steele* (1). The attention of Sir Samuel Evans, P., however, does not appear to have been directed to the decision of Gorell Barnes, J., as he then was, in the case of *In the Goods of Chilcott* (3). From the headnote of *Chilcott's* case (3), it appears that the testatrix made a will in 1889. In 1892, she executed a fresh will, prepared by a different solicitor, revoking the former will. In 1893 she executed a codicil, prepared by her original solicitor, who was in ignorance of the existence of the second will, and had inserted in the will a clause confirming the will of 1889. The cardinal facts therefore are in some respects also similar to the facts in this case. Gorell Barnes, J., in the course of his judgment said, at pp. 225, 226 :

> There is no doubt that in drawing the codicil of 1893 the solicitor meant to deal with the will of 1889. . . . In the present case there can be no doubt that the solicitor, who only knew of the existence of the first will, and supposed that the intended codicil to it had in fact been executed, applied his mind to the first will, and then drew the codicil of Sept. 7, 1893, which was duly executed. The result does not express, I am aware, the real intention of the testatrix ; but I can only deal with the documents as they stand. I think, therefore, that all three documents, namely, the wills of 1889 and 1892 and the codicil of 1893, must be admitted to probate, their meaning being left to a court of construction, if necessary, to determine.

Gorell Barnes, J., based his decision in *Chilcott's* case (3) upon the judgment of Sir James Hannen, P.,in the case of *In the Goods of Stedham In the Goods of Dyke* (4). Sir James Hannen, P., decided those cases on the ground that there was no mere mistake as to the date of the will to which it was intended to append the codicil, but that the mind of the draughtsman, which must be treated as that of the testator, was actually applied to the provisions of the earlier will, so that it was impossible to say that it was by mistake that that instrument had been referred to.

In the case before me, there is no evidence that Mr. Locking junior applied his mind to the provisions of the will of 1929, or to those of the three codicils. The question as to whether the words in the codicil of 1933 referring to the date of the last will and to the three codicils were really brought to the notice of the testator is a question of fact. I doubt very much whether in this case these words were ever really brought to the notice of the testator.

The guide to my decision in this case is sect. 22 of the Act of 1837. Do the words of the 1933 codicil show an intention to revive the revoked will of 1929 and the revoked three codicils ? I adopt the words of Sir J. P. Wilde in *Steele's* case (1), that I ought to be slow to conclude that a will has been revived in this indirect way. In this case, if Mr. Taylor in 1933, when the fourth codicil was prepared, told Mr. Locking junior that he wished to revive the 1929 will and the three codicils, Mr. Locking as an experienced solicitor surely would have specifically set out his client's intentions on that point in the codicil. There is, however, a complete absence of any words of revival. On the other hand, there is the use of the very inappropriate words "the last will" and "I confirm" in the codicil. There is the absence of any external evidence of a change in the testator's mind towards Messrs. Hallam and Adam, and there are the facts relating to the dealings in the solicitor's office with the 1929 will and the three codicils after their revocation, which indicate ignorance of their revocation on the part of Mr. Locking junior. All these factors unite to convince me that Mr. Taylor did not intend to revive the 1929 will and the three codicils, and that the words of the codicil, in the circumstances of this case, do not show an intention to revive them. I therefore decide in favour of the plaintiff's claim, and admit to probate the 1932 will as being the last will of the testator, and the 1933 codicil, omitting from the codicil the reference to the revoked 1929 will and the three revoked codicils.

Solicitors: *Gerrish & Foster*, agents for *Locking & Locking*, Hull (for the plaintiff); *Marchant, Newington & Dommett* (for the defendants and the party cited).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

J. L. KIER & CO., LTD. *v.* WHITEHEAD IRON & STEEL CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), **February 10, 11, 14, 1938.**]

Sale of Goods—Quantity sold—"Buyer's requirements up to 8,000 *tons"—Whether mere option to purchase—"Requirements."*

A contract for the sale of steel was entered into by the exchange of bought and sold notes in identical terms. The sold note was: "We have this day sold to you the undermentioned material." The quantity was thus expressed: "Buyer's total requirements up to 8,000 tons":—

HELD: (i) this was not a mere option to the purchaser to take any quantity up to 8,000 tons, including the right to take none at all.

(ii) it was a contract to supply steel up to a total quantity of 8,000 tons, but the buyer could only demand steel actually required in his business, and he could not buy to sell again.

(iii) in order to recover damages for a breach of the contract it was essential for the buyer to prove that there was a need upon his part for the steel of which delivery was required.

[**EDITORIAL NOTE.** This case deals with the construction of a very ordinary commercial contract. Naturally upon an increase of prices, the buyer would be anxious to take steel for resale, but unless he is a dealer in that metal in the ordinary course of his business, he cannot force the seller to deliver for that purpose.

AS TO QUANTITY, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 212-215, paras. 365-368; and FOR CASES, see DIGEST, Vol. 39, pp. 564, 565, Nos. 1707-1715.]

Case referred to:

(1) *Cory Bros. & Co., Ltd.* v. *Universe Petroleum Co., Ltd.* (1933), 46 Ll. L. Rep. 309.

ACTION upon a contract for the sale of goods. The nature of the claim and the relevant facts are fully stated in the judgment.

H. J. Wallington, K.C., and *Sylvester Gates* for the plaintiffs. A

A. T. Miller, K.C., and *J. P. Ashworth* for the defendants.

BRANSON, J.: This is an action which raises quite a short point. The plaintiffs are a firm who contract for the execution of concrete work, and as such are continually in need of supplies of mild steel reinforcing B bars. The defendants are a firm of manufacturers who produce such bars. On May 27, 1936, by contract notes exchanged, a contract was entered into between the plaintiffs and the defendants, the true interpretation of which is now in issue before me. It is contained, as I say, in a bought note and a sold note which, *mutatis mutandis*, are in exactly C the same form. The sold note is: "We have this day sold to you the undermentioned material." The quantity is expressed in the following words: "Buyer's total requirements up to 8,000 tons." I do not think that any other clause in the contract assists in the interpretation of those crucial words. There are certain conditions of sale, but nothing D that I can see in them helps towards the construction of the phrase: "Buyer's total requirements up to 8,000 tons." According to the case of the plaintiffs, the true interpretation of that phrase is such that "requirements" means "demands," and that it leaves the buyers open to ask for any amount they like up to 8,000 tons. On that interpretation, E it follows that they are not liable to ask for a single ton, but that they may, at any time they like, and for any purpose which suits them, demand delivery of the whole 8,000 tons. The case for the defendants is that the contract does not give that right to the buyers, but that the phrase means that the sellers are to deliver and the buyers are F to take all the mild steel bars of this description which they need for the execution of the works which they undertake to do within the period, the buyers being under the obligation to order the total of those needs from the sellers, and the sellers being under the correlative obligation to supply the total of those needs up to the 8,000 tons to the buyers. G

I have heard a good deal of evidence with regard to the way in which the word "requirements" is looked at in the trade carried on by the plaintiffs, and it was suggested that there was some kind of customary meaning attached to the word "requirements" in that trade. I do not myself regard the evidence as having fixed upon the word "requirements" H a meaning so universally and definitely fixed as to constitute evidence of a customary meaning. The truth of the matter is that it is used in a variety of expressions, sometimes simply "buyer's requirements," sometimes "buyer's total requirements," and I think that it would be only misleading to attempt to state as a finding of fact that a particular, definite meaning was attached in this business to that word. I am therefore left to construe it as it appears in this contract, without the help of any express custom of the trade. I have also been referred to a number of cases in which phrases similar to this, in contracts not the same as this, have been considered by courts in this country and in Scotland, and decisions have been arrived at—always, of course, directed to the actual language of the contract which was being construed—in which the courts have sometimes held such words as " require " or " requirements " to imply need, and sometimes have held that they would have implied a demand. I can find nothing in any of the authorities cited which I can read as a decision applicable to the language of the present contract. One case, I think, is worth referring to as being of some assistance in the method of approach, and that is the case of *Cory Bros. & Co., Ltd.* v. *Universe Petroleum Co., Ltd.* (1). It was a case in which a similar clause, " requirements up to but not exceeding 45 imperial gallons per week," was in question. ROCHE, J., as he then was, in giving judgment took very much the same view as to the paucity of help to be got from authority as that which I have just expressed, but, in arriving at the meaning which he was going to put upon the contract before him, he placed great reliance upon the form of the contract itself. In particular, he referred to a special condition upon the contract which made it clear to his mind that, in using the word " requirement," that contract meant to indicate demands, and not needs.

With those remarks as to the method of approach, I turn to this contract, and I observe that, if what the buyers are contending for is the correct interpretation, what they were getting was an option over 8,000 tons of steel. They were not entering into any contract to buy a single ton of it. They might, having got this contract with the sellers, have gone and bought any steel that they wanted from anybody else at better prices, if it so happened that they could get the steel at better prices. They were under no compulsion to order any steel at all from the sellers, who, on the other hand, were making themselves liable to supply this large quantity of steel if required. It appears to me that that is such a one-sided contract that it is inconceivable that any business firm would have entered into it without getting what one generally finds in a business transaction where one man gives an option to another—namely, some substantial consideration, in money or in some other form, for the option which is being given. Here there is a vague suggestion that this option was given in consideration of the plaintiffs placing a large order for this material with the defendants. That is denied by the witnesses for the defence, and I think that it is clear enough that that was not the reason for the giving of this option.

Another difficulty in applying the plaintiffs' interpretation to this contract is that to my mind it gives no meaning at all to the word " total," because, if " requirements " means " demands," then the phrase would have meant the same without the word " total " as it does with the word "total," because the sellers had to give the buyers their demands up to 8,000 tons. The word "total" is purely otiose. On the defendants' construction, on the other hand, there is a very good meaning to be given to it: if the true interpretation is that "requirements" equals "needs," then the quantity is ascertained by taking the total needs of the buyers up to 8,000 tons, and that prevents the buyers from filling those needs up to 8,000 tons from any source other than the sellers. There one has a contract which has some mutuality in it. The sellers are contracting to supply the buyers with all the steel that they need up to 8,000 tons, and the buyers are contracting to take from the sellers all the steel that they need up to 8,000 tons. I find nothing in any of the letters to which I have been referred which indicates that that is not the true interpretation of this contract. On the other hand, there is a phrase in one of the letters written by Mr. Kier which seems to me to bear out the view I have taken as to the correct interpretation of this language. At the end of a letter which he wrote on June 9, he said:

> After all, the contract is definitely entered into in order that we should be protected against a rise in the market, and you pointed out to us at the time how favourably we should be placed when the increase, which you said there was bound to be, took place.

There one has a view which is conformable to the interpretation which I put upon the contract. The buyers, who are users of this material, were protected against any rise of price, because, when they wanted any material for use, they had only to ask for it and they got it at the contract price. Another matter which confirms again the view which I take of the meaning of this contract is to be found in the evidence of Mr. Kier, for, if the contention of the plaintiffs is the correct one, they could at any time they liked, upon a rising market, have called for delivery of material up to 8,000 tons, and sold it on the market in competition with the defendants, who are makers and suppliers of the goods. It was put to Mr. Kier when he was being cross-examined:

> Were you hoping to sell any part of it that you did not need for your own business?—I did not intend to do so.
>
> Why not?—Because I wanted to keep it in stock.
>
> If you were entitled to ask for it irrespective of your need, you would be entitled to do what you liked with it, would you not?—Yes.
>
> That would not be considered proper in your trade, would it?—If I had taken this steel and resold it.
>
> You would have regarded yourself as acting improperly, would you not?—Yes, if I had taken it intentionally for re-selling the 4,000 tons I would, because it was not my business to buy large quantities and sell large quantities of steel.

A plainer indication that in Mr. Kier's own view this contract was not intended to enable him to order steel irrespective of his needs I think it would be difficult to imagine. I therefore hold that in this contract the word "requirements" means "needs," and that, unless it can be said that the defendants needed the 4,000 tons which they requisitioned, the defendants were under no obligation to supply it. It is perfectly plain that they did not need it for the fulfilment of any contracts which they had obtained, nor for the fulfilment of any contracts which they were operating. On the contrary, whenever they had a contract for which they needed steel, they sent a requisition to the defendants, and the defendants supplied them with the steel which was needed. They have never been in want of any steel owing to any refusal of the defendants to supply them under this contract, but it is said that, in the state of affairs which existed in June, 1937, a need arose in such businesses as the plaintiffs' for a stock of steel, a need which had not existed in this kind of business until the demands of the National Defence programme had so increased the shortage of steel that deliveries by rolling-mills were getting very much in arrear. In the correspondence, and in his evidence in the witness-box, Mr. Kier said that the reason for requisitioning this steel was not that he wanted to sell it, which would have been improper, but that he wanted to put it into stock, because, owing to the delays in delivery, it became a need of his business that he should have it there. I think that the best criterion by which to judge the need of a stock of steel for his business is to see whether Mr. Kier took any steps to fill that need by going to any other source of supply when the defendants refused to supply him with steel for stock. I have listened while the evidence was being given for any suggestion that he did try to get a stock of steel from anybody else, and I have heard of no effort made by him in that behalf. Therefore, I find it not possible to place any weight upon the point which has been urged upon me, that, even though I might hold that "requirements" in this contract means "needs," yet there was a need on the part of the plaintiffs for the steel which they were requisitioning. No such need has been proved before me, and I am satisfied that, though no doubt there was trouble from the delay in the obtaining of this steel when it was requisitioned, there was no need within the meaning of this contract for the requisitioned steel the refusal of which is relied upon in this case as a breach of contract. The result is that I hold that there has been no breach by the defendants of this contract. I enter judgment for the defendants, with costs.

Solicitors: *James Turner & Son* (for the plaintiffs); *Ingledew, Sons & Brown*, agents for *Ingledew & Sons*, Cardiff (for the defendants).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

BEAUCHAMP *v.* FROME RURAL DISTRICT COUNCIL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson, L.J., and Luxmoore, J.), **February 17, 18, 1938.**]

Water Supply—Local authority—Grant of water rights as now enjoyed—Extent of grant—Right to make additional connections.

The plaintiffs were the owners in fee simple and the tenant of a farm which had been sold to their predecessors in title in 1923. The 1923 conveyance contained the words ". . . together with the right as now enjoyed in common with others having the same right to the water supply to the hereditaments hereinbefore described through pipes from a spring. . . ." In 1933 whatever rights had been conveyed to the then purchasers in 1923 passed to the plaintiffs. In 1934 the defendants, a local authority, acquired the pipes and water rights which constituted the water supply to the farm. As a result of the construction of additional service pipes by the defendants, the supply of water to the farm was decreased. The plaintiffs sought an injunction to restrain the defendants from making these alterations:—

Held: upon the construction of the deed of 1923 the right conveyed was one to have the residue of the water after the then existing branches had been supplied through service pipes of the diameter then used. A

Decision of Farwell, J. ([1937] 4 All E.R. 348) *reversed on this point.*

[**EDITORIAL NOTE.** The Court of Appeal have taken a different view of the construction of the grant in this case from that taken by Farwell, J. The matter, though only one of construction, is one of some importance to local authorities, since it prevents them in such circumstances adding additional branches to an existing water-supply system taken over by them. B

As to Rights of Persons Injuriously Affected, see HALSBURY, 1st Edn., Vol. 28, Water Supply, p. 245, para. 464; and for Cases, see DIGEST, Vol. 43, pp. 1072-1074, Nos. 104-111.]

C

Appeal from an order of Farwell, J., dated Nov. 1, 1937, and reported in [1937] 4 All E.R. 348.

F. R. Evershed, K.C., and *Maurice Berkeley* for the appellants.

Sir Herbert Cunliffe, K.C., and *Hon. Denys B. Buckley* for the respondents.

D

Sir Wilfrid Greene, M.R.: This is an appeal from a decision of Farwell, J., dismissing the plaintiffs' action. It is not necessary to state the facts in any detail, as they are sufficiently stated in the judgment of the judge, but I must just state very shortly the position with regard to the water supply at the date of the conveyance to the plaintiffs' E predecessors in title—namely, Dec. 31, 1923. At the date of that conveyance, there were on the Mells Estate springs known as the Chantry Springs, and from those springs there ran a pipe 2 ins. in diameter to a point on the high road leading from Mells to Chantry. That pipe for the greater part of its journey between the springs and the road passed F through fields which were comprised in the conveyance to the plaintiffs' predecessors in title. Before it reached the road, there branched off from it a pipe 1 in. in diameter leading to a farm called Claveys Farm, and from Claveys Farm there were two further branches, one of them a ½-in. pipe leading to a school and thence to a lodge, the other one a G pipe of unstated diameter leading to the gardens of Mells Park. That, therefore, is a branch with what I may call two service pipes leading from it. I will refer to the actual 1½-in. pipe from where it leaves the 2-in. pipe to the point where it forks in two as a branch pipe, and the subsequent pipes that lead off it, as service pipes, though H that is only for the purpose of distinction. At a point where the 2-in. pipe was running up the road, another branch went from it, consisting of a pipe 1¼ ins. in diameter. That pipe went down through the village of Little Green to a farm called Prospect Farm, and there were apparently various standpipes by which water could be obtained from it.

That is the second branch pipe, and it had, as I say, various points at which it was tapped. After the point where the second branch pipe turns away, the water was taken from the 2-in. pipe into the farm, Mells Green Farm, the property of the plaintiffs, and it was taken by a ¾-in. pipe. The position, therefore, was that there existed a 2-in. pipe from the spring to the road, a ¾-in. pipe from that pipe a short distance into the farm, and a 1¼-in. pipe leading off to Little Green. The supply coming from those springs is one which varies according to the seasons, and of course the amount of water that could reach the farm through the ¾-in. connection into the farm was liable to be diminished by water being drawn off along the two branch pipes to which I have referred.

Bearing those facts in mind, it is necessary to examine the language of the grant to the plaintiffs' predecessors in title. The grant is this :

> . . . the right as now enjoyed in common with others having the like right to the water supply to the hereditaments hereinbefore described through pipes from a spring on a piece of land forming part of Lot 19 at the said sale the purchasers making good all damage caused by the exercise of such right . . .

As a pure matter of construction—and the first thing that has to be done is to construe the grant, and to construe it in relation to the facts as existing at the time—it seems to me clear beyond the possibility of doubt that the right conferred by the words which I have read is a right to the grantees to receive by means of the ¾-in. pipe all the water required at their farm, subject to this, that they could get only what was left after the persons entitled to draw down the existing branch pipes had taken what they wanted. In other words, it was a grant of the residue, of what should reach them after the water had been taken by the persons entitled to take water from those branches. That, it seems to me, is the minimum to which they were entitled. What the extent of that water might be would, of course, vary. It would vary in accordance with the amount of water coming from the spring and with the amount of water taken from time to time by the persons entitled to draw water through the branches, but that the right was intended to be a real right, and was in fact a valuable right, is beyond the possibility of doubt.

There is one question on the construction of this grant which it is not necessary to decide, and it is this : Are the grantees entitled to all the water that would come down the pipe other than what was drawn off through the branches by means of existing installations, including in that description service pipes, or are they, the grantees, bound to submit to a diminution of their supply caused by the construction of additional service pipes running off the branch ? It may or may not be that they are bound to submit to such diminution. It would be impossible to determine that question, of course, without knowing more of any rights antecedently granted to persons along the lines of those pipes, and in regard to that we know nothing. However, I am prepared to assume, for the purpose of considering this case, that the grantees were bound to submit, not merely to diminution of supply caused by drawing through the then existing installation of the branch pipes from their service pipe, but to diminution of supply by the addition of further service pipes to the existing branches. Even assuming that, the residuary right to water is one which is quite clearly conferred on the grantees.

What has happened is this: the defendant council has put in, at the point in the road where the 1½-in. branch-pipe goes to Little Green and the ¾-in. pipe goes into Mells Green Farm, a 2-in. pipe which draws water from the supply in the direction of Little Green. It is not necessary to say what is done with that water. It is sufficient that by means of that pipe they are drawing off water which comes from the Chantry Springs. The effect of their drawing off that water is to diminish on occasions—and, as I read the findings of fact, substantially to diminish—the supply coming to Mells Green Farm through the ¾-in. pipe. It will be remembered that, on the construction of the grant, I have said that the grantees were bound to submit to any diminution of their supply caused by water being drawn through the existing branches, but this is not one of the existing branches. It is a new branch, and it appears to me quite clear, upon the construction of the grant, that the grantees, although they had to submit to diminution of the water in fact reaching them caused by the water being drawn through the existing branches, were entitled to object to their supply being further diminished by the installation of additional branches. The language appears to me quite clearly to produce that result, for, in the first instance, the right which they are given is "the right as now enjoyed." The right as then enjoyed was to have what I may call the residuary water after the water had been drawn off down the then existing branches. Then the words are "in common with others having the like right to the water supply . . . through pipes from a spring." I cannot myself construe that in any way other than the way in which I have construed it. I should add, for the purpose of putting the matter beyond the possibility of doubt, that, when I refer to the taking of water down the existing branches as a thing to which the grantees had to submit, I do not mean by that that the diameter of the branch pipes as then existing could be enlarged, because clearly if the 1½-in. branch pipe leading to Claveys Farm or the 1½-in. pipe leading to Little Green were replaced by 2-in. pipes, the amount of water which reached the plaintiffs' farm through the ¾-in. pipe would be liable to be seriously diminished. Accordingly, the plaintiffs are entitled to complain of any subtraction of water from the water supply other than a subtraction through the existing pipes, or pipes of the same diameter substituted for them.

The judge decided the case upon the question of construction, and he held, upon the true construction of this grant, first of all, that the grantors were entitled, by means of the then existing branches, and, in particular, as an illustration, the branch which ultimately supplied Mells Park Gardens, to take away every drop of water which came from the

spring so that nothing would reach the farm. That may or may not be a correct construction of this grant, but let me assume that it was. That does not appear to me to be in the least inconsistent with the grant to the grantees of a perfectly good and valuable right to have whatever residue might remain after requirements of that character were taken.
A They would stand their chance on that construction of getting water, and no doubt they would get, especially in times of ample supply, ample water, notwithstanding the fact that the vendors at Mells Park Gardens were taking a great deal more than they were taking at the date of the grant. It seems to me that, even assuming that construction of the grant, the
B further step which the judge took of saying that, as the vendors could take away all the water through the existing branches, they were also thereby entitled to add new branches, is a step which, with all respect to the judge, I think it is illegitimate to take.

Sir Herbert Cunliffe in his argument put forward a different proposi-
C tion. There is nothing in the judge's judgment to suggest that in his view the right as granted and as diminished, in the way he construed it, was not a valid right as far as it went in law. Sir Herbert Cunliffe says, however, that this particular grant is one under which the grantors have attempted to grant something which the law will not allow them to
D grant, something, that is to say, entirely precarious, and dependent on the volition of, among others, the grantors themselves. No authority was cited which in any way supports that proposition, and in my opinion it is not a proposition which it is possible to accept. It would be indeed unfortunate if the law compelled us to treat as mere wastepaper some-
E thing which the parties had intended to give as a valuable right, and which they regarded as a right which could properly be given. On the facts as they existed at the time, nobody can doubt that the possession of this right was a valuable one. I am quite unable to accept the view that the right is one which the law will not recognise. It seems to me
F to be a valid right, and to have the effect which I have indicated. That being so, the taking of water down there in the 2-in. pipe by the council is an infringement of the plaintiffs' rights, in so far as it interferes with their requirements. I should say that, according to the construction of the grant as I construe it, and particularly having regard to the reserva-
G tion to the vendors of the right to maintain a line of pipes, I think that the property in these pipes did not pass under the conveyance to the plaintiffs' predecessors in title. It was therefore no act of trespass on the part of the council to make a connection with the pipe, which was not the plaintiffs' pipe. The wrong which the council is committing
H consists, not of the insertion of the branch pipe into the 2-in. pipe, but of the taking of water in such a way as to interfere with the plaintiffs' right to water.

That brings me to the other argument in the case, which is an argument relating to the facts. The judge, as I construe his judgment, has found quite distinctly that the taking of water by the council through their new pipe does not always interfere, but in certain circumstances, particularly in circumstances of shortage, interferes, with the plaintiffs' supply to their farm. Sir Herbert Cunliffe argued that, on the true construction of the judge's judgment, he had not come to any such finding of fact. I cannot agree with that view. It appears to me that he quite clearly did. When the view which was taken by myself and the other members of the court as to the meaning of the judge's judgment was made clear to Sir Herbert Cunliffe, and he was invited, if he wished to challenge the correctness of that finding, to refer us to the evidence, in order that we could see if it could be supported, he did not accept the invitation, and, accordingly, we are left in the position that no attempt has been made to induce us to take a view of the facts different from that taken by the judge. We take it, therefore, and proceed upon the footing, that the judge was right in his finding, and that the finding of fact to which he came is quite sufficient to support the injunction which we propose to grant.

There was a third point in the case arising under the Public Health Act, to the effect that the plaintiffs' only right was a right to compensation under that Act, but that point was decided adversely to the respondents by Farwell, J., and no attempt has been made to put it forward in this court. In the result, the appeal must be allowed, and the order which we will make is this: An injunction restraining the defendants, their servants and agents, from interfering with the supply of water to Mells Green Farm from time to time required by the plaintiffs, their successors in title, to be delivered to the said farm through the ¾-in. pipe shown within the green circle on the plan annexed to this order, and the appellants must have the costs here and below.

Clauson, L.J.: I agree.

Luxmoore, J.: I agree.

Solicitors: *Robbins, Olivey & Lake*, agents for *Nalder, Littler & Addleshaw*, Shepton Mallet (for the appellants); *Taylor, Willcocks & Co.*, agents for *E. G. Ames & Son*, Frome (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

BRIGGS *v.* PARSLOE.

[Court of Appeal (Sir Wilfrid Greene, M.R., Clauson, L.J. and Luxmoore, J.), **February 18, 1938.**]

An appeal from the decision of Farwell, J., reported [1937] 3 All E.R. 831, was settled.

TORONTO CITY CORPORATION v. YORK (TOWNSHIP) AND ATTORNEY-GENERAL FOR ONTARIO.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, Lord Maugham), **November 26, 29, 30, December 2, 1937, January 24, 1938.**]

Privy Council—Canada—Local Government—Local authority—Powers of discovery—Whether local authority or court—Severability of invalid powers of local authority—Ontario Municipal Board Act, 1932 (*c.* 27)—*Township of York Act,* 1936 (*c.* 88), *s.* 2.

The respondents, the township of York, in 1916 entered into an agreement with the city of Toronto, the appellants, whereby the city agreed to supply water to the township on certain terms at a certain rate of payment. The agreement contained a provision that the rate might be altered by agreement or by arbitration. This agreement was confirmed by statute. Later, in 1936, the legislature of Ontario conferred statutory powers on the Ontario Municipal Board to vary the rates charged for water supplied under the agreement, and to settle any differences arising between the parties to the agreement. In pursuance of the Act, application was made by the respondents to the municipal board to vary the rate, and in respect of that application the board made an order that the appellants should make discovery of documents and permit inspection of their waterworks system, and ordered the appellants' commissioner of works to be examined on discovery. The appellants disputed the validity of any act of the municipal board as constituted, and, alternatively, the validity of the Act of 1936 :—

HELD : (i) the Ontario Municipal Board was primarily an administrative body, and, as such, was validly constituted. In so far as the Ontario legislature had purported to give it judicial authority, that attempt must fail, because the entrusting of those duties to an administrative board appointed by the province would be contrary to the British North America Act, 1867, ss. 96, 99, 100. Such parts of the Act of 1936 as purported to vest in the board the functions of a court had no effect, but were severable. The objection to the validity of the board as such therefore failed.

(ii) the powers of examination and of inspection and discovery of documents were not inconsistent with the powers of an administrative body, the duty of which it might be to ascertain the facts with which it was dealing.

Judgment of the Court of Appeal of Ontario ([1937] O.R. 177) *affirmed.*

[EDITORIAL NOTE. Powers of inspection and discovery of documents are usually associated with a court of justice, but a grant of them by a statute is here held not to be inconsistent with the creation of a purely administrative body. In the present case the statute granted some further powers, which could only be construed as those of a court of justice. The statute was not enacted in the only way in which a court of justice could be established in the province concerned, but it is held that the provisions which are consistent only with the establishment of a court of justice are severable.

AS TO THE CONFERRING OF POWERS ON LOCAL AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 21, pp. 235-238, paras. 433-436 ; and FOR CASES, see DIGEST, Vol. 33, p. 28, Nos. 133-136.]

Cases referred to :

(1) *Proprietary Articles Trade Assocn.* v. *A.-G. for Canada,* [1931] A.C. 310; Digest Supp. ; 100 L.J.P.C. 84 ; 144 L.T. 577.

(2) *O'Connor* v. *Waldron,* [1935] A.C. 76 ; Digest Supp. ; 104 L.J.P.C. 21 ; 152 L.T. 289.

(3) *Toronto Ry. Co.* v. *Toronto City*, [1920] A.C. 446; 17 Digest 439, *158*; 89 L.J.P.C. 90; 122 L.T. 641.

(4) *Shell Co. of Australia, Ltd.* v. *Federal Comr. of Taxation*, [1931] A.C. 275; Digest Supp.; 100 L.J.P.C. 55; 144 L.T. 421.

(5) *Martineau (O.) & Sons, Ltd.* v. *Montreal (City)*, [1932] A.C. 113; Digest Supp.; 101 L.J.P.C. 49; 146 L.T. 291.

(6) *Fielding* v. *Thomas*, [1896] A.C. 600; 17 Digest 427, *83*; 65 L.J.P.C. 103; 75 L.T. 216.

(7) *Board of Education* v. *Rice*, [1911] A.C. 179; 19 Digest 602, *290*; 80 L.J.K.B. 796; 104 L.T. 689.

(8) *Brooks-Bidlake & Whittall, Ltd.* v. *A.-G. for British Columbia*, [1923] A.C. 450; 17 Digest 439, *160*; 92 L.J.P.C. 124; 128 L.T. 801.

(9) *Strickland* v. *Hayes*, [1896] 1 Q.B. 290; 38 Digest 164, *97*; 65 L.J.M.C. 55; 74 L.T. 137.

(10) *Pickering* v. *Ilfracombe Ry. Co.* (1868), L.R. 3 C.P. 235; 12 Digest 291, *2391*; 37 L.J.C.P. 118; 17 L.T. 650.

(11) *R.* v. *Lundie* (1862), 31 L.J.M.C. 157; 13 Digest 333, *716*; 5 L.T. 830.

(12) *Dyson* v. *London & North Western Ry. Co.* (1881), 7 Q.B.D. 32; 8 Digest 111, *751*; 50 L.J.M.C. 78; 44 L.T. 609.

(13) *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627; 42 Digest 676, *874*; 55 L.J.P.C. 69; 55 L.T. 446.

(14) *R.* v. *Faversham Fishermen's Co.* (1799), 8 Term Rep. 352; 13 Digest 306, *378*.

(15) *Great West Saddlery Co.* v. *R.*, [1921] 2 A.C. 91; 17 Digest 440, *168*; 90 L.J.P.C. 102; 125 L.T. 136.

(16) *R.* v. *Coote* (1873), L.R. 4 P.C. 599; 17 Digest 445, *180*; 42 L.J.P.C. 45; 29 L.T. 111.

(17) *St. John* v. *Fraser*, [1935] S.C.R. 441; Digest Supp.

(18) *Huish* v. *Liverpool JJ.*, [1914] 1 K.B. 109; 16 Digest 99, *13*; 83 L.J.K.B. 133; 110 L.T. 38.

(19) *Sutton* v. *Great Northern Ry. Co.*, [1909] 2 K.B. 791; 18 Digest 51, *89*; 79 L.J.K.B. 81; 101 L.T. 175.

(20) *Macleod* v. *A.-G. for New South Wales*, [1891] A.C. 455; 17 Digest 425, *66*; 60 L.J.P.C. 55; 65 L.T. 321.

(21) *Lymburn* v. *Mayland*, [1932] A.C. 318; Digest Supp.; 101 L.J.P.C. 89; 146 L.T. 458.

(22) *Grand Trunk Ry. Co.* v. *Robertson*, [1909] A.C. 325; 8 Digest 145, case *n*.

(23) *A.-G. for Alberta* v. *A.-G. for Canada*, [1915] A.C. 363; 17 Digest 438, *156*; 84 L.J.P.C. 58; 112 L.T. 177.

(24) *Canadian Pacific Ry. Co.* v. *Grand Trunk Ry. Co.* (1914), 49 S.C.R. 525.

(25) *Kemp* v. *Neville* (1861), 10 C.B.N.S. 523; 38 Digest 78, *550*; 31 L.J.C.P. 158; 4 L.T. 640.

(26) *R.* v. *Maidenhead Corpn.* (1882), 9 Q.B.D. 494; 38 Digest 592, *1226*; 51 L.J.Q.B. 444; 47 L.T. 529.

APPEAL by special leave from a judgment of the Court of Appeal for Ontario (ROWELL, C.J.O., RIDDELL, MIDDLETON, FISHER, HENDERSON, JJ.A.), dated Dec. 4, 1936, dismissing an appeal from an order of the Ontario Municipal Board, dated Sept. 23, 1936, whereby the appellant corporation was ordered to make discovery on oath of relevant documents and to permit inspection of its waterworks system and to order its commissioner of works to attend for examination on discovery. The facts of the case are set out in the judgment of their Lordships delivered by LORD ATKIN.

W. N. Tilley, K.C., and *C. M. Colquhoun, K.C.*, for the appellants: The Ontario Municipal Board Act, 1932, confers judicial functions on the board, the members of which are not appointed by the Governor-General, as required by the British North America Act, 1867, s. 96, and is *ultra vires*. The Township of York Act, 1936, s. 2, attempts to confer additional jurisdiction on the board so improperly constituted. The section is itself *ultra vires*, and the Court of Appeal erred in holding that this section could be regarded as *ultra vires* in part and *intra vires* as to the balance. The rules made by the board under which it acted relate to the exercise of its judicial, rather than to any administrative, functions vested in it. The board had no jurisdiction to make the order in question, because, if a court, it was not properly constituted, and, if an administrative body, it was not properly authorised. [Counsel referred to *Toronto Ry. Co.* v. *Toronto City* (3), *Shell Co. of Australia, Ltd.* v. *Federal Comr. of Taxation* (4), *Martineau (O.) & Sons, Ltd.* v. *Montreal (City)* (5).]

Frank Gahan for the Attorney-General of Canada, intervener: I adopt the argument of *Tilley, K.C.*, in its entirety. The jurisdiction of the board cannot be upheld on the ground that it is in the present case exercising a power of revising a contract such as no court possesses. The conferring on the board of such a power cannot change the general character of the Act.

G. W. Mason, K.C., for the respondent: The whole purpose of the board was as an administrative board, and, in order to exercise such a function, it has certain powers given to it. Even if on occasion the board may have acted as a court, which is not admitted, it should not be regarded as always acting as a court, because when acting as an administrative tribunal it is not acting as a court. Bodies that are not courts have power to examine witnesses on oath, and to order production and discovery, and the exercise of such powers does not constitute a body a judicial body. Such powers have been exercised in Ontario for many years. The Ontario Municipal Board has statutory power, under the Ontario Municipal Board Act, 1932, to make general rules regulating its practice and procedure, and has in fact made such rules, which provide for discovery and production, and also power, for the due exercise of its jurisdiction and powers, to exercise the same powers, rights and privileges as are vested in the Supreme Court of Ontario as to production and inspection of documents, entry upon and inspection of property, and other matters. Any portions of the section which may be open to objection are severable from the rest of the section. [Counsel referred to *Fielding* v. *Thomas* (6), *O'Connor* v. *Waldron* (2), *Board of Education* v. *Rice* (7), *Toronto Ry. Co.* v. *Toronto City* (3), *Shell Co. of Australia, Ltd.* v. *Federal Comr. of Taxation* (4), *Brooks-Bidlake & Whittall, Ltd.* v. *A.-G. for British Columbia* (8), *Strickland* v. *Hayes* (9), *Pickering* v. *Ilfracombe Ry. Co.* (10), *R.* v. *Lundie* (11), *Dyson* v. *London & North Western Ry. Co.* (12), *Salmon*

v. *Duncombe* (13), *R.* v. *Faversham Fishermen's Co.* (14), *Great West Saddlery Co.* v. *R.* (15), *R.* v. *Coote* (16), *St. John* v. *Fraser* (17), *Huish* v. *Liverpool JJ.* (18), *Sutton* v. *Great Northern Ry. Co.* (19).]

Salter A. Hayden, K.C., for the Attorney-General for Ontario, intervener: The board here exercises certain powers of a purely administrative character, which it is competent for the legislature of Ontario A to confer on it, and the mere circumstance that the legislature may have purported to confer upon the board powers of a judicial character which might be assumed to be *ultra vires* the legislature of Ontario does not invalidate their term of office. [Counsel referred to *Macleod* v. *A.-G. for New South Wales* (20), *O'Connor* v. *Waldron* (2), *Toronto Ry. Co.* v. B *Toronto City* (3), *Lymburn* v. *Mayland* (21).]

Tilley, K.C., in reply, referred to *Grand Trunk Ry. Co.* v. *Robertson* (22), *A.-G. for Alberta* v. *A.-G. for Canada* (23), *Canadian Pacific Ry. Co.* v. *Grand Trunk Ry. Co.* (24), *Sutton* v. *Great Northern Ry. Co.* (19), *Kemp* v. *Neville* (25), and *R.* v. *Maidenhead Corpn.* (26).] C

Lord Atkin: This is an appeal from the Court of Appeal of Ontario dismissing an appeal from an order of the Ontario Municipal Board which ordered the appellants to make discovery of documents and to permit inspection of their waterworks system and ordered the appellants' com- D missioner of works to be examined on discovery. The board made the order in pursuance of powers contained in the Ontario Municipal Board Act, 1932, and in the course of an application brought before them by the respondents, the York Corporation, in pursuance of the Township of York Act, 1936. The contentions of the appellants are: (i) that the E board is invalidly constituted as being a superior court constituted in violation of sects. 96, 99 and 100 of the British North America Act; (ii) that in any case the power to make the order in question is one that could be exercised only by such a court; (iii) that the Act of 1936 is invalid as purporting to vest the jurisdiction of a superior court in the F municipal board.

A short statement of the circumstances leading to the dispute between the parties will suffice. In 1916 the township entered into an agreement with the city whereby the city agreed to supply water to the township on terms, including payment at the rate of 20 cents per 1,000 G gallons. The agreement contained a provision that the rate might be altered by agreement or by arbitration. An arbitration clause provided for arbitration by two officials of the respective corporations, and, in the event of disagreement, by a county court judge. The agreement was confirmed in 1917 by a statute of Ontario of 7 Geo. V, c. 98. In H 1936 the legislature of Ontario passed the Act 1 Ed. VIII, cl. 88, which provided that, notwithstanding the provisions of the agreement of 1916:

> either party to the said agreement may from time to time apply to the Ontario Municipal Board to vary the rates to be charged for water supplied by the said city corporation under the terms of the said agreement or to settle any differences arising between the parties to the said agreement as to the construction thereof,

> or as to any matters relating to or arising out of the agreement, and the Ontario Municipal Board shall have jurisdiction to vary and fix the said rates, and to hear and determine any such application, and the decision of the said board on any such application shall be final and conclusive and shall not be subject to appeal.

Application was made by the township to the municipal board in pursuance of this Act to vary the rate for water supplied, and it was in respect of that application that the order complained of was made. It will be seen that the attack of the appellants is twofold. They dispute the validity of any Act of the municipal board as at present constituted, and, if this contention fails, they attack the validity of the Act of 1936.

The first question touches a matter of first importance to the people of Canada. While legislative power in relation to the constitution, maintenance and organisation of provincial courts of civil jurisdiction, including procedure in civil matters, is confided to the province, the independence of the judges is protected by provisions that the judges of the superior, district, and county courts shall be appointed by the Governor-General (sect. 96), that the judges of the superior courts shall hold office during good behaviour (sect. 99), and that the salaries of the judges of the superior, district, and county courts shall be fixed and provided by the Parliament of Canada (sect. 100). These are three principal pillars in the temple of justice, and they are not to be undermined. Is, then, the Municipal Board of Ontario a superior court, or a tribunal analogous thereto ? If it is, inasmuch as the Act of 1932 which sets it up observes none of the provisions of the sections above referred to, it must be invalidly constituted.

However, a study of the provisions of the Municipal Board Act, read in the light of its history as a successor to the Ontario Railway and Municipal Board (see sects. 6 and 7), leads their Lordships to the conclusion that the board is primarily, in " pith and substance," an administrative body. Parts IV, V, VI and VII are almost entirely administrative, and, though some of them are now repealed, and the duties of the board transferred to other administrative channels, their existence assists to reveal the original legislative intention. Mr. Gershom Mason in his argument for the respondents gave a survey of the multifarious administrative duties which from time to time had been imposed upon the board and its predecessor by legislation of the province. It is unnecessary to review the statutes. It is sufficient to say that, in respect of municipal institutions, highways, railways, Public Utility Acts dealing with water, gas and electricity, telephones, and apparently other matters as well, the board is entrusted with duties of supervision and decision which are purely administrative, and which in their totality would appear to make it one of the most important parts of administrative machinery in the province. Primarily, as has been said, it's function is administrative, but Mr. Tilley, for the appellants, emphasised with much force the provisions in Part III of the Act, especially sects. 41-46, 54 and 59, as indicating that the board was entrusted with the jurisdiction and powers of a superior court, and within the purview of those sections was in fact constituted a superior court. It is difficult to avoid the conclusion that, whatever be the definition given to court of justice, or judicial power, the sections in question do purport to clothe the board with the functions of a court, and to vest in it judicial powers. Making that assumption, however, their Lordships are not prepared to accept the further proposition that the board is therefore for all purposes invalidly constituted. It is primarily an administrative body: so far as legislation has purported to give it judicial authority, that attempt must fail. It is not validly constituted to receive judicial authority: so far as the Act therefore purports to constitute the board a court of justice analogous to a superior, district or county court, it is *pro tanto* invalid, not because the board is invalidly constituted, for as an administrative body its constitution is within the provincial powers, nor because the province cannot give the judicial powers in question to any court, for to a court complying with the requirements of sects. 96, 99 and 100 of the British North America Act the province may entrust such judicial duties as it thinks fit, but because to entrust these duties to an administrative board appointed by the province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the board the functions of a court have no effect. They are, however, severable. There is nothing to suggest that the board would not have been granted its administrative powers without the addition of the judicial powers complained of. The objection to the validity of the board as such therefore fails. Their Lordships have found it unnecessary to discuss in detail how far some of the powers alleged to be judicial are in fact merely administrative. The question does not arise in the present case, and, in accordance with their Lordships' usual practice in constitutional matters, they will not embarrass future discussion when, if ever, such a dispute arises.

The remaining parts of the case seem to present little difficulty. The powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a court of justice, are not inconsistent with the powers of an administrative body the duty of which it may be to ascertain the facts with which it is dealing. The powers in this case seem to be in substance identical with those in the Combines Investigation Act, R.S.C. 1927 (c. 26), the validity of which was affirmed in *Proprietary Articles Trade Assocn.* v. *A.-G. for Canada* (1), and the existence of which was held not to make a commissioner armed with them a court of justice in *O'Connor* v. *Waldron* (2). The only remaining question is whether the Act of 1936 was valid. Their Lordships agree with the judgment of the Chief Justice of Ontario on this point. Assuming that the first part of the section purports to confer judicial function on the board, it is clearly inoperative, but the second part relates to an administrative function, and appears to their Lordships clearly severable. The result is that the order complained of was a valid order, the order of the Court of Appeal affirming it was right, and this appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of this appeal.

Appeal dismissed with costs.

Solicitors: *Freshfields, Leese & Munns* (for the appellants); *Gard, Lyell & Co.* (for the respondent); *Charles Russell & Co.* (for the Attorney-General of Canada); *Blake & Redden* (for the Attorney-General of Ontario).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

Re WHITE STAR LINE, LTD.

[COURT OF APPEAL (Lord Romer, MacKinnon and Clauson, L.JJ.), **December 17, 1937, January 11, 12, February 17, 1938.**]

Companies—Winding up—Contributory—Calls on shares—Payment in money's worth—Deferred payment certificates—Companies Act, 1929 (c. 23), *s.* 157 (1) (*d*).

The R.M. Co. was the holder of a large number of shares in the W.S. Co. Both companies were in liquidation, and a claim was made by the liquidator of the W.S. Co. requiring the payment of £750,990 from the R.M. Co. as contributories in respect of the shares. The R.M. Co. contended that by an arrangement sanctioned by the court the sum of £750,990 was agreed to be satisfied by the issue of deferred creditors' certificates by which the payment of the debt was postponed to an indefinite date, the W.S. Co. together with all other creditors obtaining a certain measure of control over the business of the R.M. Co. and payment of interest in the meantime only out of contingent profits. It was contended that this was a payment in money's worth of the calls upon the shares. The deferred certificates were at all material times worth less than their face value:—

HELD: on a due consideration of all the facts, money's worth was not given by the issue of the certificates. The consideration for the release of the calls was, therefore, illusory and the transaction did not amount to payment within the Companies Act, 1929, s. 157.

[**EDITORIAL NOTE.** Calls on shares must be paid in money or money's worth and, if whatever is taken instead of money is not a proper consideration for the release of the amount due upon the call, then it does not amount to a payment of the call. In other words, there remains an amount unpaid on the shares in respect of which the shareholder is liable as a present or past member within the meaning of the Companies Act, 1929, s. 157 (1) (*d*). In the present case, it is held that certain certificates given to creditors, under which the creditors got no immediate payment, but a mere prospect of payment in the indefinite future, together with an immediate right to interest on their debts and some control over the affairs of the company, did not amount to a payment within the terms of the section.

AS TO RIGHTS OF CONTRIBUTORIES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 669-671, paras. 1104-1107; and FOR CASES, see DIGEST, Vol. 10, pp. 936-939, Nos. 6416-6439.]

Cases referred to:

(1) *Re Wragg, Ltd.*, [1897] 1 Ch. 796; 9 Digest 310, *1928*; 66 L.J.Ch. 419: 76 L.T. 397.

(2) *Mosely* v. *Koffyfontein Mines, Ltd.*, [1904] 2 Ch. 108; 9 Digest 295, *1831*: 73 L.J.Ch. 569; 91 L.T. 266.

(3) *Ooregum Gold Mining Co. of India* v. *Roper, Wallroth* v. *Roper*, [1892] A.C. 125; 9 Digest 293, *1821*; 61 L.J.Ch. 337; 66 L.T. 427.

(4) *Re Innes & Co., Ltd.*, [1903] 2 Ch. 254; 9 Digest 310, *1926*; 72 L.J.Ch. 643; 89 L.T. 142.

(5) *Re Overend, Gurney & Co., Grissell's Case* (1866), 1 Ch. App. 528; 10 Digest A 937, *6423*; 35 L.J.Ch. 752; 14 L.T. 843.

(6) *Re General Works Co., Gill's Case* (1879), 12 Ch.D. 755; 10 Digest 939, *6435*; 48 L.J.Ch. 774; 41 L.T. 21.

(7) *Re West of England Bank, Ex p. Brown* (1879), 12 Ch.D. 823; 10 Digest 934, *6408*; 48 L.J.Ch. 604; 41 L.T. 27.

(8) *Re Auriferous Properties, Ltd. (No. 2)*, [1898] 2 Ch. 428; 10 Digest 999, B *6933*; 67 L.J.Ch. 574; 79 L.T. 71.

Appeal by the liquidator of the White Star Line, Ltd. from an order of Bennett, J., dated June 23, 1937. The facts of the case are fully set out in the judgment of the court.

The Companies Act, 1929, s. 157 (1) (*d*), is as follows: C

> (1) In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of subsect. (2) of this section and the following qualifications . . . (*d*) in the case of a company limited by shares no contribution D shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member . . .

C. E. Harman, K.C., and *Gerald Upjohn* for the liquidator of the White Star Line, Ltd., the appellant.

F. R. Evershed, K.C., and *W. Gordon Brown* for the liquidator of The E Royal Mail Steam Packet Co., the respondent.

Clauson, L.J. [delivering the judgment of the court]: This is an application in the liquidation of the White Star Line, Ltd., a company limited by shares, now in compulsory liquidation under an order of Apr. 8, 1935. The object of the application is to ascertain what are F the rights of the Royal Mail Steam Packet Co., Ltd. (also a company limited by shares and in compulsory liquidation under an order of the court of Feb. 10, 1936), in regard to payment out of the assets of the White Star Co. of a very large sum, the bulk of which is admittedly due from the White Star Co. to the Royal Mail Co. The difficulty in G the case arises from the fact that the Royal Mail Co. are, and at all material times have been, holders of a very large block of shares in the capital of the White Star Co., and it becomes necessary to determine the legal position of the Royal Mail Co. as holders of those shares, in view of the fact that the White Star Co. are in liquidation, and that their H assets—apart, at all events, from such contributions to their funds as the liquidator is entitled to call upon the shareholders to make—are insufficient to meet their liabilities.

Put quite shortly, the contention of the liquidator of the White Star Co. is that he is in a position to require a contribution from the Royal

Mail Co. to the assets of the White Star Co. of £750,990, that sum, as he contends, being still unpaid on the shares held by the Royal Mail Co. in the White Star Co. He admits that, if that contribution is made in full, the Royal Mail Co. will be entitled to be paid a dividend in due course upon a very large sum admittedly due to them.

A The contention of the Royal Mail Co. is that there is nothing unpaid on the shares which they hold in the White Star Co. If they establish this contention, it follows that, without making any contribution to the assets of the White Star Co., they will be entitled to be paid a dividend in due course upon a sum of approximately £2,500,000, subject to a
B set off of any cross-claim (there would in fact be a cross-claim of upwards of £1,000,000) made by the White Star Co.

The first question is whether, in the circumstances of the case, the Royal Mail Co. are correct in their contention that there is nothing unpaid on the shares which they hold in the White Star Co.

C At the end of 1931, the Royal Mail Co. held, and they still hold, 1,501,100 ordinary shares of £1 each in the White Star Co. Up to the end of 1931, 14*s*. per share had been paid up on 1,000,000 of these shares, and 2*s*. had been paid up on 501,100 of these shares. The amount required to pay up the shares in full was, accordingly, at that date
D £750,990. Calls had been made for the total amount unpaid on the shares, and, accordingly, the White Star Co. were specialty creditors of the Royal Mail Co. for the £750,990 as well as for interest on the calls. The Royal Mail Co. contend that since Jan. 1, 1932, the sum of £750,990 has been paid up on the shares. They say, and it is admitted, that by
E a document of Apr. 7, 1932, the White Star Co. agreed (subject to EVE, J., confirming the scheme next-mentioned) to be bound by a certain scheme of arrangement then proposed, and consequently confirmed by EVE, J., the material provisions of the scheme being that the debts of the Royal Mail Co. should be satisfied by the issue to the respective creditors of
F deferred creditors' certificates of the nominal amount of their respective debts. The effect, as regards any ordinary creditor, of accepting certificates in accordance with the scheme was, to put it shortly, that his right to immediate payment of his debt was exchanged for a right to be paid the amount of it at an indefinitely postponed date, that the amount
G was to carry interest payable only out of certain profits, and that he obtained a certain measure of control as one of the whole body of certificate-holders over the conduct of the business of the Royal Mail Co. The document of Apr. 7, 1932, did not contain the whole of the terms agreed between the Royal Mail Co. and the White Star Co. That
H document was supplemented by two letters exchanged between the two companies, dated May 19, 1932, and May 30, 1932, respectively.

Before BENNETT, J., and before this court, two quite separate points were raised in regard to the operation of the arrangement thus come to between the companies. In the first place, it was said on behalf of the White Star Co. that, upon the true construction of the document of

Apr. 7, 1932, and of the scheme, the specialty debt of £750,990 was not satisfied or discharged, but was merely postponed, a postponement which, in view of the supervening liquidation of the Royal Mail Co., would be immaterial for the purpose now in hand, and that, accordingly, in the circumstances of the case, the arrangement made became ineffective, and the specialty debt remained a due and unpaid debt, and that, accordingly, the shares to the extent of the £750,990 remained unpaid shares. The judge rejected this contention. The arguments in support of this contention are stated in detail in his judgment, as are also his reasons for rejecting the contention. We can see no flaw in these reasons, and we agree with him that this contention put forward on behalf of the White Star Co. fails.

The second point raised may be stated shortly as follows. It related, not to the sum due from the Royal Mail Co. in respect of the shares held by the Royal Mail Co. in the White Star Co., but to the bulk of the sum claimed to be due from the White Star Co. to the Royal Mail Co. That claim arose in this way. In 1926, the International Mercantile Marine Co. owned a block of shares in the Oceanic Co. These shares the Royal Mail Co. agreed to buy from the International Mercantile Marine Co. for a sum of £7,000,000, payable by instalments. In 1927, the Royal Mail Co. resold the Oceanic shares to the White Star Co. for the same purchase price, payable by like instalments, to be paid by the White Star Co. to the Royal Mail Co., in each case, a day before the due date of the instalment payable by the Royal Mail Co. to the International Co. The bulk of the sum claimed to be due in the liquidation of the White Star Co. from that company to the Royal Mail Co. consisted of the balance of this purchase price. It was suggested on behalf of the White Star Co. that the effect of the letters was to reduce the liability of the White Star Co. from the instalment figure to such figure as the Royal Mail Co. should in fact pay to the International Co. in respect of the corresponding instalment. The Royal Mail Co. have in fact paid nothing in respect of that instalment to the International Co., and it was accordingly suggested that the Royal Mail Co. could not, *rebus sic stantibus*, claim the instalment from the White Star Co. The detailed circumstances material to this point, and the arguments put forward, are clearly stated in the judge's judgment, as also is his view that the argument has no foundation. We agree with his view, and with the reasons given for it, and we find it unnecessary to deal further with the point. We accordingly agree with the judge that the intention of the parties to the arrangement they entered into in 1932 was to discharge the specialty debt of £750,990 for calls, and the transaction can be accurately stated as one under which the White Star Co. accepted the deferred creditors' certificates by way of accord and satisfaction of the amount due for calls, or, in other words, for the amount unpaid, on the shares held by the Royal Mail Co. in the White Star Co. The question which arises is whether the transaction is valid, with the result that

thereby £750,990 was paid up on the shares. If the answer is yes, then, by reason of the Companies Act, 1929, s. 157 (1) (*d*), the liquidator of the White Star Co. can make no further claim in respect of those shares, and his contention must fail. The White Star Co. is a company limited by shares, and by reason of sect. 157 the liquidator cannot call upon the
A Royal Mail Co. as shareholders to provide funds to meet the company's debts save to an amount equal to the amount unpaid on the shares held in the White Star Co. by the Royal Mail Co.

The reported authorities establish that a sum payable on a share held in a company limited by shares, in response to a call made while the
B company is a going concern, is effectually paid up, so as to protect the shareholder *pro tanto* from further liability on the share, if that sum is paid in money or money's worth; *per* LINDLEY, L.J., in *Re Wragg, Ltd.* (1), at p. 831, and *per* VAUGHAN WILLIAMS, L.J., in *Mosely* v. *Koffyfontein Mines, Ltd.* (2), at p. 114: that a payment is an effective
C payment in money's worth if the consideration given by way of payment is something which is *bona fide* regarded by the parties to the payment as fairly representing the sum which the payment is to discharge: *per* LORD WATSON in *Ooregum Gold Mining Co. of India* v. *Roper* (3), at p. 136. If the consideration given by way of payment is
D a mere blind, or clearly colourable or illusory (see *per* A. L. SMITH, L.J., in *Re Wragg, Ltd.* (1), at p. 836), the so-called payment up is ineffectual for the purpose. The question as to whether the consideration is colourable is one of fact in each case: *per* VAUGHAN WILLIAMS, L.J., in *Re Innes & Co., Ltd.* (4), at p. 262. It was argued in the present case that the
E sum due on the calls made before 1932 was a specialty debt, that a specialty debt may be discharged by accord and satisfaction, and that the debt in the present case was so discharged. Reference was made to the language used by LINDLEY, L.J., in *Re Wragg, Ltd.* (1), at p. 826, where he says:

> F It has never been doubted, so far as I know, that the obligation of every shareholder in a limited company to pay to the company the nominal amount of his shares could be satisfied by a transaction which amounted to accord and satisfaction or set-off as distinguished from payment in cash.

However, it is necessary also to refer to a subsequent passage in the
G same judgment, at p. 829, where his Lordship says:

> Specialty debts, like other debts, can be discharged in more ways than one, e.g., by payment, set-off, accord and satisfaction, and release.

It is significant that, while he goes on to point out that any mode of discharging a specialty debt is as available to a shareholder as it is to
H any other specialty debtor, he makes the statement expressly subject to the qualification introduced by the doctrine of *ultra vires*, or, in other words, the doctrine of the limited capacity of statutory corporations. He points out that it is obviously beyond the power of a limited company, without receiving payment in money or money's worth, to release a shareholder from his obligation to pay up his shares. In view of the

principles to be deduced from the authorities, it is clear that a discharge by accord and satisfaction of the specialty debt resulting from a call must be subject to the qualification that the consideration which is given by way of satisfaction must not be a mere blind, or clearly colourable or illusory, and that the question as to whether or not it is so is one of fact, and the language of LINDLEY, L.J., cannot, in our judgment, fairly be construed otherwise. In *Re Wragg, Ltd.* (1), A. L. SMITH, L.J., indicated the opinion (accepted as correct by counsel in argument in the present case) that, if, in a contract for payment up in money's worth, a money value less than the face value of the sum to be paid up be placed upon the consideration, the fact that the shares were not fully paid up in money or money's worth would be apparent on the face of the contract. It was, however, strenuously argued before this court that, unless and until the contract is impeached in an independent action for that purpose, any consideration which, on the face of the contract, is accepted by the company as money's worth, must be taken as money's worth until the contract is set aside. We are not prepared to hold that, if the facts are sufficiently plain, the court is bound to insist on what, after all, in such a case is a mere technical requirement—namely, that the contract for payment in what is represented as money's worth should be impeached in an independent action. If the true view of the contract in question is that the consideration accepted is a mere promise of deferred payment, with a liability for payment of interest in the meantime only out of contingent profits, it would seem obvious that the consideration is not "money's worth" to the amount of the sum for which the shareholder is immediately liable. The matter is, of course, not necessarily so clear if, as in the present case, an advantage is, by the bargain, given to a creditor company by way of a measure of control over the debtor's business being vested in the creditor company as part of the contract. On a due consideration of the actual facts in the present case, however, we are satisfied that money's worth was not in fact given, or, to use alternative language, that the consideration was colourable or illusory in so far as it was represented as being of the value of £750,990. The material evidence on this point stands as follows: By letter of Mar. 25, 1937, the liquidator of the Royal Mail Co. admitted, for the purposes of the present proceedings, that the deferred certificates issued by the Royal Mail Co. under the scheme were at all material times worth less than their nominal or face value, and, further, by letter of May 3, 1937, that to the knowledge of Sir William McClintock, the liquidator of the Royal Mail Co., who was a director of the Royal Mail Co. from Oct. 20, 1932, to the date of liquidation, the deferred certificates were at all material times worth less than their nominal or face value. There is also before the court an affidavit by Mr. Charlton, who was intimately concerned with the scheme and was from 1930 a director of the White Star Co., to the effect that the certificates were at all material times, and in particular at the time when the scheme was sanctioned by the court, worth a great deal less than their nominal or face value. He adds that everyone with a knowledge of the affairs of the Royal Mail Co. realised, when the scheme was sanctioned, and also when the certificates were issued, that it must be several years before the revenues of the Royal Mail Co. would be sufficient to permit any payment of interest on the certificates, and that the value of the certificates was therefore wholly speculative, and that the facts were well known to the directors of the White Star Co.

In our judgment, it is possible to draw one inference only from these facts—namely, that the transaction was an acceptance by the White Star Co. of the deferred certificates, not as in any sense a payment for the £750,990 due for calls on the shares, but as the best that could be saved out of the wreck of the Royal Mail Co.'s finances towards making some provision for compensation in the future for the failure of the Royal Mail Co. to provide a sum of £750,990, which they were unable in fact to pay. The transaction was in effect a release of the Royal Mail Co. from a liability which they could not meet at the time, in consideration of a limited obligation undertaken by them, which was, and was understood by everyone to be, far less onerous than the obligation to pay £750,990, some control being given to the certificate-holders over the future conduct of the Royal Mail Co.'s affairs. It is not, in our view, possible, as the authorities stand, to hold, on the facts, that such a transaction amounted to payment of £750,990, in the sense in which the word " paid " is used in the Companies Act, 1929, s. 157.

If the view above expressed be correct, it must follow that the Royal Mail Co. is to be treated as the holder of shares on which £750,990 remains unpaid, and they have no answer to the claim of the liquidator of the White Star Co. that they are liable to pay the sum. True it is that, if the liquidator claimed that sum in the liquidation of the Royal Mail Co., he might have to be content with his right of proof. He is, however, not claiming any right to share in the assets of the Royal Mail Co. All that he claims is that, until the Royal Mail Co. (who are, as shareholders in the White Star Co., liable for the debts of the White Star Co. up to the limit imposed by the limited nature of the company) pay up this liability, they cannot compete with other creditors of the White Star Co. against the funds of the White Star Co. available to meet the White Star Co.'s debts. That this must necessarily be so appears to follow from the decision in *Grissell's Case* (5), a decision which is not only unimpeachable as a matter of reasoning, but is also binding on this court. It is suggested that the position was varied by the Judicature Act, 1875, s. 10, now represented by the Companies Act, 1929, s. 262. This court could not so decide without overruling the decision of Bacon, V.-C., in *Gill's Case* (6), the decision of Fry, J., in *Re West of England Bank, Ex p. Brown* (7), and the decision of Wright, J., in *Re Auriferous Properties, Ltd.* (*No.* 2) (8). We see no flaw in the reasoning in those judgments, and we are not prepared to overrule them.

We were given to understand in the course of the case that there is no question between the parties as to the figure of the proof which the liquidator of the Royal Mail Co. would be entitled to put in against the White Star Co. if and when he has paid up the £750,990 in full. It is obvious that the liquidator of the White Star Co. cannot make any claim under the deferred creditors' certificates issued to the White Star Co. in view of the abortive nature of the arrangement intended to be made between the companies in 1932. The order of the judge admitted the proof of the Royal Mail Co. at a figure which gave effect to the cross-claim of the White Star Co. on the deferred creditors' certificates. The order of this court will be to the following effect: the order of Bennett, J., will be discharged, except in so far as it directed that an earlier proof, sworn May 30, 1935, be expunged. The order will declare that the amounts unpaid on the shares held by the Royal Mail Co. in the White Star Co. are in the aggregate £750,990, and that the Royal Mail Co. are entitled to prove in the liquidation for a figure which will be specified in the order, and will, as we understand, be settled between the liquidators, and will be, or will approximate to, the figure of £2,742,942 6*s.* 3*d.*, mentioned in the notice of appeal, but the order will further declare that the Royal Mail Co. are not to be entitled in respect of that proof to receive dividends in the winding up of the White Star Co., except on the footing of paying in cash such calls as may be duly made in the liquidation of the White Star Co. on the shares held by the Royal Mail Co. in the White Star Co. The liquidator of the Royal Mail Co. will be ordered to pay to the liquidator of the White Star Co. his taxed costs of the application by summons dated Mar. 6, 1937, and of this appeal, and it would seem proper, subject to anything which the parties may wish to say on the point, that those costs should include the costs of the application by summons dated Nov. 12, 1936. If desired, leave will be given to appeal to the House of Lords.

Solicitors: *Stafford Clark & Co.* (for the appellant); *Linklaters & Paines* (for the respondent).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

UPJOHN *v.* SEYMOUR ESTATES, LTD.

[King's Bench Division (Goddard, J.), **July 21, 22, 23, 1937, February 9, 16, 1938.**]

Boundaries—Party wall—Severance—Right of support and user—Law of Property Act, 1925 (*c.* 20), *s.* 38 (1).

The plaintiff and the defendant company were the owners of adjoining houses, which had been built about 80 years ago. The defendant company, for the purpose of building some flats, proceeded to demolish their house, and took the appropriate steps under the London Building Act, since they would be interfering with the party wall between the two houses. The surveyors thought the wall strong enough to withstand the demolition. Although certain shores were put up, the demolition caused a serious bulge in the wall, and, finally, the defendant company's half of the wall collapsed. The plaintiff's half of the wall had in it two recesses, which, upon the collapse of the defendant company's half, caused two apertures, and, by reason of these apertures, the plaintiff's stock was damaged :—

HELD : (i) the defendant company did not trespass on the party wall separating their premises from those of the plaintiff.

A (ii) the plaintiff's premises and his half of the party wall were entitled to the rights of support or user from the defendant company's premises and their half of the party wall, and such support or user, which included the protection of the apertures above referred to, had been withdrawn.

B [**EDITORIAL NOTE.** The Law of Property Act, 1925, s. 38, provided that from the commencement of that Act party walls should be treated as severed vertically, and the owner of each part was to have such rights to support and user as might be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created. This case considers the right to support, or rather of user, referred to in the section.

C AS TO EXTENT OF RIGHT OF SUPPORT, see HALSBURY, Hailsham Edn., Vol. 3, pp. 159, 160, para. 275 ; and FOR CASES, see DIGEST, Vol. 7, pp. 305-310, Nos. 269-315.]

ACTION for damages for the withdrawal of support from a party wall and the adjoining building generally by the demolition of a building.

D *R. P. Croom-Johnson, K.C.*, and *P. B. Morle* for the plaintiff.

K. Greer Jackson for the defendants.

GODDARD, J. : When this case first came before me last July, the parties agreed in asking me to decide three issues : (i) did the defendants E trespass on the party wall separating the plaintiff's premises from those of the defendants, and, if so, what is the nature of the damage resulting therefrom ; (ii) were the plaintiff's premises, including his moiety of the party wall, entitled to support from the defendants' premises ; and (iii) did the defendants withdraw support, and, if so, F what is the nature of the damage that resulted ? After the case had been partly heard, owing to what I considered was the defective and insufficient discovery given by the defendants, I felt obliged to accede to Mr. Croom-Johnson's application for an adjournment to consider further documents which came to light in the course of the trial. The G case was not then restored to the list until Feb., 1938, when the hearing was concluded, and I have now to give my findings on the issues which I have mentioned. The case is by no means free from difficulty, which has been increased by the adjournment, and it is not easy to deal with it without considering the question of damage, upon which I have not H had evidence, as a result of the parties' agreement.

The facts which give rise to the section are, I find, these. The plaintiff is the owner of No. 94, Camden Road, where he lives, and carries on a tailoring business. The defendant company bought the adjoining house, No. 92, for the purpose of demolition and rebuilding. The two houses were part of a terrace, and must, I think, have been built at or about the same time, the date of building being probably some 80 or more years ago. The houses were apparently fair specimens of their class, poorly built, and were, at the material time, near the end of their life. The plaintiff, however, after a survey, had obtained a substantial advance from a building society, and, had his house been left undisturbed, I have no reason to doubt that it would have lasted for a good many more years. The defendant company, however, acquired not only No. 92 but also several more adjoining houses, intending to demolish them and to build flats on the site. When they had pulled down the houses up to No. 92, they had to take the appropriate steps under the London Building Act before they demolished the latter house, as they would be interfering with the party wall between Nos. 92 and 94. They accordingly served the appropriate notice on the plaintiff, and this resulted in the appointment of surveyors under sect. 117 of the Act, who proceeded to inspect the respective premises with a view to making a party-wall award. The gentlemen who were appointed were not persons with particularly high qualifications, although I do not doubt that they both had considerable practical experience. They both thought that the party wall was in a satisfactory condition, and I do not for a moment underrate the difficulty of their particular task in coming to a conclusion on this point. In fact, the party wall was not in a satisfactory condition. It would, if left alone, have doubtless served its purpose for a good many years, but it was in no state to withstand shocks. However, the surveyors proceeded to draft an award, and they decided that the wall was in a sufficiently substantial and sound condition for the present purpose of the building owners. Unfortunately, before the award was signed, and without any notice to the plaintiff or his surveyor, the defendants began to demolish their building in about the last week in July, 1936. They had shores put up against the wall, but no sooner was the ground floor of No. 92 taken out than an ominous bulge became apparent in the lower part of the party wall on the side where the demolition was in progress. I do not think that the bulge could have existed in No. 94 before demolition. I think that it is much more likely that the disturbance caused by the demolition in taking down the staircase that was against the wall, and which afforded it some, albeit a meagre, degree of support, and the exposure, worked on a constitution weakened already by age and infirmity, and caused the bulge, which was the first symptom of impending collapse. The bulge was noticed by the defendants' foreman on Aug. 12, and he sent for the district surveyor, who visited the premises on the same day. He ordered additional shoring to be put up, and had a hole dug so that he could see the footings of the wall. He also caused a dangerous structure notice to be served on both parties, and this was delivered on Aug. 13. For some wholly unexplained reason, the defendants did not proceed, either on Aug. 12 or on Aug. 13, to put up the additional shoring. Had they done so, all this trouble, or the greater part of it, might have been avoided.

They had simply done nothing by the night of Aug. 13, and on that night the wall collapsed.

Here, it may be convenient to refer to the Law of Property Act, 1925, s. 38 (1), which provides that, in the case of a party wall:

> . . . that structure shall be and remain severed vertically as between the respective owners, and the owner of each part shall have such rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created.

The part which collapsed was the defendants' half, but, when it fell, two apertures into the plaintiff's shop were exposed. One was the site of a fireplace, and the other was the site of a recess at the side, and it was largely owing to those apertures, which, of course, admitted dirt and débris, that the plaintiff's stock suffered as badly as it did. I have had no evidence which satisfies me as to the reason why these apertures existed as they did. It may be that at some time the wall had been cut away to form a fireplace and a recess, though I think that it is most unlikely, because of the presence of the flue. It may, on the other hand, be—and, as I think, this is more likely—that, when the houses were built, the wall was built to only half its thickness at those two places. However that may be, the part which fell was the defendants' half, and, if the wall were actually to have been cut down vertically, as it is, notionally, for the purposes of sect. 38, there would have been two places in the plaintiff's half unoccupied by brickwork and backed only by the defendants' half. Mr. Greer Jackson argued that, as only the defendants' half had fallen, and as he had committed no trespass, his clients were not guilty of any wrong towards the plaintiff. There is no evidence of any trespass by the defendants, but, by allowing their part of the wall to fall, they not only withdrew such support as it afforded to the plaintiff's part, and to the rest of his premises, but also deprived him of the right of user over the defendants' wall, which protected the apertures to which I have referred, and which were exposed, and left exposed, by its collapse, and to which user he was entitled by the effect of the statute. To complete the history so far as it has been proved, the plaintiff had to quit his house and shop. His stock suffered severely, as did his business, but it does seem to me, although I have not had all the evidence on the points before me, as I am not dealing with damage, that, if immediate and proper precautions had been taken, and if rebuilding had been put in hand at once, a great deal of the damage would have been avoided, although I realise that this must have presented great difficulties to a man of the plaintiff's position and resources. The following April, the front of the house bulged, a window fell out, and cracks appeared. It is suggested that this is due, as I understand it, in part to the withdrawal of support, and in part to the way the defendants have rebuilt their part of the party wall, putting, as it is suggested, an undue strain on the old house—a case of new wine in old bottles. While it is not for me to pronounce any findings on this part of the case, as the evidence has not all been given, it would seem impossible to dissociate this damage both from the withdrawal of the support and from the rebuilding. One or other, or perhaps both, one would suppose to be the cause, especially as, in my opinion, so far as I can form one, on the evidence which has been given, not only the wall but also the house itself, owing to its age and original construction, were in no condition to stand the sort of shocks A that they experienced.

Accordingly, I answer the questions submitted to me as follows: (i) the defendants did not trespass on the party wall separating their premises from the plaintiff's; (ii) the plaintiff's premises and his moiety of the party wall were entitled to support from the defendants' premises B and their moiety of the party wall; (iii) the defendants did withdraw support, and cause damage to the plaintiff and his property.

There will be judgment for the plaintiff for damages to be assessed by an official referee, and the plaintiff shall have the costs of the action.

Judgment for the plaintiff with costs. C

Solicitors: *W. P. Davies & Son* (for the plaintiff); *Blewitt & Son* (for the defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

D

CANADIAN SHREDDED WHEAT CO., LTD. *v.* KELLOGG CO OF CANADA, LTD., AND ANOTHER.

[Privy Council (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Maugham), **December 9, 10, 13, 14, 16, 1937, February 4, 1938.]** E

Privy Council—Canada—Trade marks and trade names—"Shredded wheat"—Capability of registration—Distinctive or merely descriptive words—Secondary meaning—Passing off—Product similar in shape but not in size—Carton quite different in make-up—Trade Mark and Design Act (*R.S.C.*, 1927, *c.* 201), *ss.* 5 (1), 13.

F The appellant company for over thirty years have manufactured and sold a product known as shredded wheat, and, until 1914, when the patent expired, were the sole vendors of the article in Canada. The apparatus for the manufacture of the product was also protected by patent, which expired in 1919, when the appellants' monopoly ceased. The appellant company had registered in 1928 the words "shredded wheat" as their trade mark to be applied to the sale of biscuits and G crackers, and in 1929 the same words were registered as their trade mark to be applied to the sale of cereal foods. The respondent company in 1934 commenced to sell in Canada biscuits of shredded wheat made by substantially the same process. The biscuit was of the same shape as, but smaller than, that made by the appellant company, and the carton in which the biscuits were contained was quite different from that used by the appellants. The appellants claimed an injunction to H restrain the respondents from infringing their registered trade mark "shredded wheat," and, alternatively, an injunction to restrain respondents from, by a use of the same words or any words only colourably differing therefrom, passing off their biscuits as the appellant company's biscuits:—

Held: (i) the appellants were in no way using the words "shredded wheat" as indicative of the origin of the goods contained in their carton, but only as descriptive of those goods. The words, which were both the name of, and descriptive of, the invented product, had not acquired the secondary meaning of being distinctive of goods manufactured exclusively by the appellant company, and this was clear from the use made of them by the company in their cartons and advertisements. The requisite secondary meaning of exclusive distinctiveness had not been established. The registration of the appellant company's trade mark "shredded wheat" was invalid, and the action for infringement failed.

(ii) once it was established, as here, that the words "shredded wheat" were both the name of a product and descriptive of it, an action for passing off through the use of those words must fail.

Judgment of the Court of Appeal of Ontario ([1936] O.R. 613) *affirmed.*

[**EDITORIAL NOTE.** The circumstances of this case are exceptional in trade mark and passing off cases. The company seeking exclusive rights had originally manufactured under patents granted in respect of the article itself and in respect of the machinery used in its manufacture. They had therefore enjoyed a monopoly which had expired, and this fact would necessarily limit their right after the expiry of the patent to register a trade mark which would virtually extend their monopoly.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 27, Trade Marks and Trade Names, pp. 694, 695, para. 1259; and FOR CASES, see DIGEST, Vol. 43, pp. 182-186, Nos. 330-353.]

Cases referred to:

(1) *Re Palmer's Trade Mark* (1883), 24 Ch.D. 504; 43 Digest 179, *317*; 50 L.T. 30.

(2) *Standard Ideal Co.* v. *Standard Sanitary Co., C.R.*, [1911] A.C. 78; 43 Digest 136, case *3 iv;* [1911] A.C. 259; 80 L.J.P.C. 87; 103 L.T. 440; 27 R.P.C. 789.

(3) *Channell, Ltd.* v. *Rombough* (*B. C.*), [1925] 1 D.L.R. 233; 43 Digest 137, case *o.*

(4) *Re Crosfield* (*J.*) *& Sons, Ltd.*, [1910] 1 Ch. 130; 43 Digest 153, *114*; 79 L.J.Ch. 211; 101 L.T. 587; 26 R.P.C. 837.

(5) *Reddaway* v. *Banham*, [1896] A.C. 199; 43 Digest 277, *1098*; 65 L.J.Q.B. 381; 74 L.T. 289; 13 R.P.C. 218.

(6) *Cellular Clothing Co.* v. *Maxton & Murray*, [1899] A.C. 326; 43 Digest 276, *1090*; 68 L.J.P.C. 72; 80 L.T. 809; 16 R.P.C. 397.

(7) *Burberrys* v. *Cording* (*J. C.*) *& Co., Ltd.* (1909), 100 L.T. 985; 43 Digest 304, *1280*; 26 R.P.C. 693.

(8) *William Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.*, [1911] A.C. 693; 43 Digest 312, *1345*; 80 L.J.Ch. 744; 105 L.T. 459.

(9) *Boake* (*A.*), *Roberts & Co., Ltd.* v. *Wayland* (*W. A.*) *& Co., Re Boake* (*A.*), *Roberts & Co., Ltd.'s, Trade Marks* (1909), 26 R.P.C. 251; 43 Digest 227, *713.*

(10) *National Biscuit Co.* v. *Kellogg Co.* (1935), 24 U.S. Patent Quarterly, 138.

(11) *Edison Storage Battery Co.* v. *Britannia Batteries, Ltd.* (1931), 48 R.P.C. 350; Digest Supp.

(12) *Brock* (*C. T.*) *& Co.'s "Crystal Palace" Fireworks, Ltd.* v. *Pain* (*James*) *& Sons* (1911), 105 L.T. 976; 43 Digest 271, *1064*; 28 R.P.C. 697.

(13) *Re Coats* (*J. & P.*), *Ltd.'s, Application*, [1936] 2 All E.R. 975; Digest Supp.; 155 L.T. 127; 53 R.P.C. 355.

(14) *Trade Marks Registrar* v. *Du Cros* (*W. & G.*), *Ltd.*, [1913] A.C. 624; 43 Digest 155, *138*; 83 L.J.Ch. 1; 109 L.T. 687; 30 R.P.C. 660.

(15) *Re Casella* (*Leopold*) *& Co.*, [1910] 2 Ch. 240; 43 Digest 143, *54*; 79 L.J.Ch. 529; 102 L.T. 792; 27 R.P.C. 453.

(16) *Linoleum Manufacturing Co.* v. *Nairn* (1878), 7 Ch.D. 834; 43 Digest 280, *1111*; 47 L.J.Ch. 430; 38 L.T. 448.

(17) *Re Chesebrough's Trade Mark "Vaseline,"* [1902] 2 Ch. 1; 43 Digest 280, *1112*; 71 L.J.Ch. 427; 86 L.T. 665.

(18) *Re Gramophone Co.'s Application*, [1910] 2 Ch. 423; 79 L.J.Ch. 658: 103 L.T. 107.

(19) *Re Davis's Trade Marks, Davis* v. *Sussex Rubber Co.*, [1927] 2 Ch. 345; 43 Digest 145, *67*; 97 L.J.Ch. 8; 137 L.T. 714; 44 R.P.C. 412.

(20) *Cochrane* v. *Macnish*, [1896] A.C. 225; 43 Digest 325, *1456*; 65 L.J.P.C. 20; 74 L.T. 109.

(21) *Wotherspoon* v. *Currie* (1872), L.R. 5 H.L. 508; 43 Digest 273, *1073*; 42 L.J.Ch. 130; 27 L.T. 393.

(22) *Re Williams & Co.'s, Ltd., Application* (1917), 86 L.J.Ch. 273; 43 Digest 154, *129*; 116 L.T. 456; 34 R.P.C. 197.

(23) *Siegert* v. *Findlater* (1878), 7 Ch. D. 801; 43 Digest 271, *1063*; 47 L.J.Ch. 233; 38 L.T. 349.

(24) *British Vacuum Cleaner Co., Ltd.* v. *New Vacuum Cleaner Co., Ltd.*, [1907] 2 Ch. 312; 9 Digest 65, *198*; 76 L.J.Ch. 511; 97 L.T. 201; 24 R.P.C. 641.

(25) *Parsons* v. *Gillespie*, [1898] A.C. 239; 43 Digest 276, *1089*; 67 L.J.P.C. 21; 15 R.P.C. 57.

(26) *Bowden Wire, Ltd.* v. *Bowden Brake Co., Ltd. (No. 1), Re Bowden Wire, Ltd.'s, Trade Marks* (1913), 30 R.P.C. 580; 43 Digest 195, *429*; *on appeal*, 31 R.P.C. 385.

(27) *Universal Winding Co.* v. *Hattersley (George) & Sons, Ltd.* (1915), 32 R.P.C. 479; 43 Digest 272, *1071*.

(28) *Perry Davis* v. *Harbord* (1890), 15 App. Cas. 316; 43 Digest 179, *320*; 60 L.J.Ch. 16; 63 L.T. 389.

(29) *Irving's Yeast-Vite, Ltd.* v. *Horsenail (Ex p.)* (1934), 103 L.J.Ch. 106; Digest Supp.; 150 L.T. 402; 51 R.P.C. 110.

(30) *Singer Manufacturing Co.* v. *June Manufacturing Co.* (1896), 163 U.S.R. 169.

(31) *Birmingham Vinegar Brewery Co.* v. *Powell*, [1897] A.C. 710; 43 Digest 274, *1076*; 66 L.J.Ch. 763; 76 L.T. 792; 14 R.P.C. 720.

(32) *Williams (J. B.) Co.* v. *Bronnley (H.) & Co., Ltd., Williams (J. B.) Co.* v. *Williams* (1909), 26 R.P.C. 765; 43 Digest 286, *1152*.

(33) *Johnston* v. *Orr Ewing* (1882), 7 App. Cas. 219; 43 Digest 313, *1354*; 51 L.J.Ch. 797; 46 L.T. 216.

(34) *Lever* v. *Goodwin* (1887), 36 Ch.D. 1; 43 Digest 334, *1562*; 57 L.T. 583; 4 R.P.C. 492.

APPEAL from a judgment of the Court of Appeal for Ontario (LATCHFORD, C.J.A., RIDDELL, MIDDLETON, MASTEN and HENDERSON, JJ.A.), dated Nov. 30, 1936, affirming a judgment of the Supreme Court of Ontario (MCTAGUE, J.), dated Mar. 30, 1936, dismissing the appellant's action for the infringement of two trade marks and for passing off.

The facts of the case are set out in the judgment of their Lordships delivered by LORD RUSSELL OF KILLOWEN.

W. N. Tilley, K.C., Hon. Sir Stafford Cripps, K.C., R. C. H. Cassels, K.C., and *Geoffrey W. Tookey* for the appellants.

Russell S. Smart, K.C., and *Christopher C. Robinson, K.C.*, for the respondents.

Cripps, K.C.: The words "shredded wheat" are not descriptive of the appellants' biscuit. They do not constitute the name of the article manufactured and sold by the appellants, but are adapted to distinguish, and do in fact distinguish, the biscuit manufactured by the appellants from biscuits manufactured by other persons.

Even if the words "shredded wheat" were originally descriptive, they have acquired a secondary meaning, and to the trade and the purchasing public denote the product of the appellants. The form, shape and appearance of the appellants' biscuit are distinctive. They have always been the same since the article came upon the market, and have always been identified with the manufacture of the appellants, both to the trade and to the purchasing public. Similar articles have been on the market in Canada for a number of years, but under a different name, e.g., "muffets."

The form, shape and appearance of the respondents' biscuit, whether taken alone or in conjunction with the use of the phrase "shredded whole wheat biscuit," are calculated to deceive and cause confusion, and to pass off or lead to the passing off of the respondents' product for that of the appellants. [Counsel referred to *Re Crosfield (J.) & Sons, Ltd.* (4), *Brock (C. T.) & Co.'s "Crystal Palace" Fireworks, Ltd.* v. *James Pain & Sons* (12), *Re J. & P. Coats, Ltd.'s Application* (13), *Trade Marks Registrar* v. *W. & G. Du Cros, Ltd.* (14), *Re Leopold Casella & Co.* (15), *Linoleum Manufacturing Co.* v. *Nairn* (16), *Re Chesebrough's Trade Mark "Vaseline"* (17), *Boake (A.), Roberts & Co., Ltd.* v. *Wayland (W. A.) & Co.* (9), *Re Gramophone Company's Application* (18), *William Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.* (8), *Edison Storage Battery Co.* v. *Britannia Batteries, Ltd.* (11), *Reddaway* v. *Banham* (5), *Cellular Clothing Co.* v. *Maxton & Murray* (6), *Re Davis's Trade Marks* (19), *Cochrane* v. *Macnish* (20), *Wotherspoon* v. *Currie* (21).]

Smart, K.C.: The words "shredded wheat" do not, as the statute requires, "contain the essentials necessary to constitute a trade mark, properly speaking." They were descriptive, or, alternatively, misdescriptive, and could not in the circumstances, and did not in fact, acquire a secondary meaning. The words were not adopted or used by the appellants for the purpose of distinguishing their product from similar products of others, and, if the words are not distinctive, then a customer is not deceived if he gets the respondents' product. "Shredded wheat" is the name of the article. The appearance of the respondent company's biscuits naturally results from using the process and machines described in Perky's expired patents, and it is not commercially practicable to make shredded wheat biscuits with any substantially different appearance. The business is a package business, and the respondents' package has been made distinctive. The passing-off issue can affect only such sales as take place in hotels and restaurants, and the responsibility of the respondents ends when their package is broken. [Counsel referred to *Cellular Clothing Co.* v. *Maxton & Murray* (6), *Re Williams & Co.'s, Ltd., Application* (22), *Re Chesebrough's Trade Mark "Vaseline"* (17), *Reddaway* v. *Banham* (5), *Linoleum Manufacturing Co.* v. *Nairn* (16), *Siegert* v. *Findlater* (23), *British Vacuum Cleaner Co., Ltd.* v. *New Vacuum*

Cleaner Co., Ltd. (24), *Burberrys* v. *J. C. Cording & Co., Ltd.* (7), *Parsons* v. *Gillespie* (25), *Bowden Wire, Ltd.* v. *Bowden Brake Co., Ltd.* (*No.* 1) (26), *Universal Winding Co.* v. *Hattersley (George) & Sons, Ltd.* (27), *Perry Davis* v. *Harbord* (28), *Irving's Yeast-Vite, Ltd.* v. *Horsenail* (29), *National Biscuit Co.* v. *Kellogg Co.* (10), *Singer Manufacturing Co.* v. *June Manufacturing Co.* (30), *William Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.* (8), *Birmingham Vinegar Brewery Co.* v. *Powell* (31), *Williams (J. B.) Co.* v. *Bronnley (H.) & Co., Ltd.* (32).]

Cripps, K.C., in reply: The respondents admit that "shredded wheat" is registrable, if distinctive. It is a fallacy to argue that the words must be either distinctive or descriptive. They may be both. The onus is on the respondents to prove that the mark is not distinctive. The mark is already on the register. The respondents have called no evidence on this point, except that to be implied from the carton itself. When the patent expires, the "words" come into the public jurisdiction, and can acquire a secondary meaning. [Counsel referred to *Williams (J.B.) Co.* v. *Bronnley (H.) & Co., Ltd.* (32), *William Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.* (8), *Johnston* v. *Orr Ewing* (33), *Lever* v. *Goodwin* (34).]

LORD RUSSELL OF KILLOWEN: The circumstances which have given rise to this litigation are exceptional, and must be stated in some detail. On May 27, 1896, one Henry D. Perky obtained a grant of Canadian letters patent (No. 52,428) covering a new product which he had invented, and a process and machine by means of which the new product was prepared or produced. According to the patent, wheat is taken in berry form, and, after being thoroughly washed, is boiled for about an hour. It is then dried for some hours. The berries are then passed between compression rollers, one or both of which is or are provided with a series of fine circumferential grooves, whereby the berries are mashed, and their outer bran coats, gluten layers and starchy interior portions are thoroughly incorporated together and forced into the grooves, whence the resultant food is discharged by means of a comb "in light porous and tender threads or filaments into a pan or other receptacle, or upon a moving receiver whereby they may be disposed in layers." The specification then proceeds as follows:

> The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways.
>
> The food presented is a purely cereal product, and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other foreign ingredients, and the percentage of water in the food is much less than in ordinary bread.
>
> The article as produced is a food or bread composed of superposed or massed layers or deposits of comparatively dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat, containing intermixed the bran, starch and gluten of the entire berry, and which is absolutely free from leavening or raising material or other products.

The apparatus for carrying out the process is then described, and finally the product, the process and the apparatus are severally claimed, the claim for the invented product being thus phrased :

> A food or bread composed of superposed or massed layers or deposits of comparatively dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch and gluten of the entire berry and which is free from leavening or raising material or other products. A

It will be seen that the invented product is the food as discharged from the rollers, which may be either collected in a receptacle, or formed into layers by means of a moving receiver, and which may be used in its then condition, or may be further cooked by being baked in shapes.

B On Aug. 13, 1901, Perky obtained a grant of Canadian letters patent (No. 72,695) for improvements in and relating to machines for making biscuits and other articles. This patent covered the machine which was used by the plaintiff for the production of biscuit shapes, composed of the new product (the subject of patent No. 52,428) which issued from the C rollers on to a travelling band. The new product was called, and was known by the name of, shredded wheat. Although the process covered by patent No. 52,428 may be strictly a mashing rather than a shredding process, the product in fact presents every appearance of having been shredded, and it is to be observed that the patentee in his patent No. D 72,695 himself refers to the process as "shredding the grain." There can be no manner of doubt that the name shredded wheat very aptly describes the new product. The new product was first marketed in Canada in the year 1898 by a company which was registered in the United States of America, and which had its factory in that country. E It continued to be imported from the United States into Canada and sold there to some extent for some six or seven years. In the year 1904, the plaintiff company was incorporated under the laws of the Province of Ontario. It acquired the goodwill of the business in Canada of the company which was at that time importing the product into Canada F and selling it there. It built a factory for its manufacture on the Canadian side of Niagara Falls, and in 1905 commenced, and has ever since continued, to manufacture the product in Canada, and to sell it there. The product was sold in two forms, the one a biscuit, which consisted of the shredded wheat produced by the process and apparatus protected by G patent No. 52,428, after it had been panned and cut for baking by the apparatus protected by patent No. 72,695, and baked, the other a biscuit made of the same material cut in a flattened and compressed form, which the plaintiff company sold under the name "triscuit." The trade in triscuits was small, but the plaintiff company's trade in the other biscuit H undoubtedly developed large proportions.

The patent No. 52,428 expired in 1914. Down to that time no one had sold or could sell the product known as shredded wheat in Canada except the plaintiff company and its predecessors in title. In other words, for some 17 or 18 years the plaintiff company and its predecessors had enjoyed the monopoly of selling the patented product in Canada. Upon the expiry of the patent, anyone in Canada could make it. The patent No. 72,695 expired in 1919. The plaintiff company's monopoly thereunder then ceased, and any manufacturer of the product in Canada could use the apparatus covered by that patent, for the purpose of panning and cutting the product for baking. Anyone would be entitled to sell in Canada as shredded wheat, or as shredded wheat biscuits, the articles so produced, provided that in so doing he did not (i) infringe some other person's trade mark, or (ii) pass off the goods as being the manufacture of some other person.

In 1912 the plaintiff company had registered in Canada as a trade mark "to be applied to the sale of shredded cereal biscuit," a picture of a shredded wheat biscuit in a dish or bowl, with a spoon resting in the bowl. The biscuit as depicted shows the shape, resembling somewhat a little pillow or roll, which the biscuit apparently necessarily assumed after the article, which resulted from the product having been panned and cut by the apparatus under patent No. 72,695, had been baked. For some years after the expiry of the two patents, the plaintiff company continued in fact to enjoy its monopoly in Canada. No rival manufacturers appeared upon the scene. In 1924 a strange event happened. The United States Company (the Natural Food Company), which had in 1904 sold the goodwill of its Canadian business to the plaintiff company, had changed its name to the Shredded Wheat Co. In Mar., 1924, it applied to have registered as its trade mark in Canada in respect of biscuits or crackers the words "shredded wheat," alleging (amongst other things) that from Jan. 1, 1894, to date it had adopted and used the said trade mark by applying it to cartons containing the biscuits, that no other person had used the mark in Canada in connection with the sale of goods, and that it had had a factory at Niagara Falls, Ontario, for a great number of years. Here was a pretty confusion of ideas and entities. However, the words "shredded wheat" were in fact registered in the Trade Mark Register at Ottawa as the trade mark of the Shredded Wheat Company, to be applied to the sale of biscuits or crackers, and the words remained so registered for more than three years. The registration, however, was cancelled in Sept., 1927. On Mar. 20, 1928, the words "shredded wheat" were registered as the plaintiff company's trade mark to be applied to the sale of biscuits and crackers, and on Apr. 3, 1929, the same words were registered as its trade mark to be applied to the sale of cereal foods cooked or prepared for consumption.

In 1934, the Kellogg Co. of Canada, Ltd., the first defendant to the action (hereinafter called Kellogg's), began to sell in Canada biscuits made of shredded wheat. Among their customers was a retail grocer, one Solomon Bassin (the second defendant to the action), who in turn resold some of the said biscuits to his retail customers. The plaintiff company immediately issued the writ in these proceedings, and obtained an undertaking (without prejudice) which had the effect of stopping the alleged wrongful sales until the trial or other final disposition of the action.

The biscuits sold in Canada by the defendants were made by the same, or substantially the same, process as that by which the plaintiff company's biscuits are made. In other words, the patented processes
A were used, and the patented product was thereby produced. The biscuit manufactured by Kellogg's, though of the same pillow or sausage-roll shape, was some 25 per cent. shorter in length. It would seem from the evidence that the rounded pillow shape is the result of puffing-up in the baking of the product, after it has been panned and cut by the
B apparatus protected by patent No. 72,695. The length and width would be determined by the width of the stream of the product and the spacing of the cutters. Kellogg's sold their shredded wheat biscuits in cartons, each containing 15 biscuits packed in 5 layers of 3 biscuits each, the layers being separated by a corrugated separator or pad. The carton
C contained on each of its four sides, and also on the top and bottom, the words "Kellogg's Shredded Whole Wheat Biscuit." On the top and bottom appeared the words "Made in U.S.A." On the two broad sides appeared the words "W. K. Kellogg" and "Kellogg Company, Battle Creek, Michigan." The cartons made it plain for all the world to see that
D the contents of the cartons were biscuits composed of shredded wheat, manufactured by a U.S.A. company called the Kellogg Company. No passing off by means of get-up of the cartons is alleged, or could be alleged, by the plaintiff company. Indeed, Kellogg's carton was in all respects quite different in get-up and appearance from the cartons in
E use by the plaintiff company. Apart from a question of passing off by reason of the form or shape of Kellogg's biscuit, the plaintiff company's claims to relief are two, and are both founded upon the use by Kellogg's of the two words "shredded wheat."

In the first place, the plaintiff company claims an injunction to restrain
F the defendants from infringing the registered trade marks consisting of the words "shredded wheat," by the use of the words "shredded wheat," or "shredded whole wheat" or "shredded whole wheat biscuit" or any words only colourably differing therefrom. As to this claim, their Lordships at this stage content themselves with observing that, if the
G plaintiff company's said trade marks are valid trade marks, there can, in their opinion, be no doubt that the defendants, by selling biscuits as shredded whole wheat biscuits, do infringe those marks. If the plaintiff company succeeds on the first claim, no injunction in respect of alleged passing off by the use of the words "shredded wheat" would be
H required, but, in the event of the trade marks being held invalid, the plaintiff company asks for an injunction to restrain the defendants from (putting it shortly), by the use of the same words or any words only colourably differing therefrom, passing off Kellogg's biscuits as the plaintiff company's biscuits. Their Lordships proceed to deal with these alternative claims, each of which, as will be seen, involves a consideration

of the question of the aptness or capability of the words "shredded wheat" to distinguish the product or article manufactured by the plaintiff company from a similar product or article manufactured by anyone else, or their aptness or capability of indicating that goods to which they are applied are the exclusive manufacture of the plaintiff company.

The plaintiff company's first trade mark was not registered until A 1928, when application was made to register the words " shredded wheat " to be applied to the sale of biscuits and crackers. For years down to 1912 the plaintiff company had been the sole manufacturer of biscuits composed of a patented product to which had been given the name shredded wheat, a name, as their Lordships think, completely descrip- B tive of the patented product. There can be little doubt that, had the plaintiff company, when the patent expired, attempted to register the words " shredded wheat " as a trade mark for the sale of biscuits and crackers, the application would have met with short shrift. It would be attempting, by registering the name of the patented product, to prolong C the patent monopoly, and this may not be done. Had the plaintiff company, during the currency of the patent, applied to the product manufactured by it a distinctive trade mark duly registered, it could have effectively secured for itself a means by which, when the patent expired, the shredded wheat which it manufactured would be dis- D tinguished from the shredded wheat manufactured by others, if and when anyone chose to avail himself of the right then open to the public of manufacturing shredded wheat. This the plaintiff company failed to do, except for the registration in 1912 of the bowl-and-spoon trade mark before referred to, and its user to the extent which hereinafter appears. E The language used by Lindley, L.J., in *Re Palmer's Trade Mark* (1), at p. 521, may properly be quoted in this connection :

> I do not mean to say that a manufacturer of a patented article cannot have a trade-mark not descriptive of the patented article so as to be entitled to the exclusive use of that mark after the patent has expired ; for instance, if he impressed on F the patented articles a griffin, or some other device ; but if his only trade-mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers.

The plaintiff company, however, claims that, in the interval between the expiry of the patent in 1914 and the registration of the trade mark in G 1928, no one else (with one possible exception) had manufactured the patented product, and that the words had in fact become distinctive of its manufacture, and were properly registrable as its trade mark accordingly. The trade marks here in question were registered under the Trade Mark and Design Act (R.S.C., 1927, c. 201). Sect. 5 (1) defines H what for the purposes of the Act shall be considered and known as trade marks, in the following terms :

> 5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by

him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

By sect. 13 it is provided that, after registration, the proprietor "shall have the exclusive right to use the trade mark to designate articles A manufactured or sold by him." By sect. 11, however, registration may be refused "if the so-called trade mark does not contain the essentials necessary to constitute a trade mark properly speaking." The effect of this provision is that a word which is merely descriptive of the character and quality of the goods in connection with which it is used is not B registrable under the Act as a trade mark: *Standard Ideal Co.* v. *Standard Sanitary Co.* (2) and *Channell, Ltd.* v. *Rombough* (3). It is, however, clear that such a descriptive word may possibly have acquired a secondary meaning, and have come to mean or to indicate that the goods in connection with which it is used are the goods of a particular manufacturer: C in other words that the word in question has in its secondary meaning become indicative of origin: *Re Crosfield (J.) & Sons, Ltd.* (4). The onus on the person who attempts to establish this secondary meaning, however, is a heavy one. If, in addition to being descriptive of the goods in connection with which it is used, it is in fact the name of the D product of which those goods are composed, then it would seem to their Lordships that a state of affairs exists which makes it extremely difficult that the word should ever become indicative of origin, so as to render it capable of registration as a trade mark. The difficulty may sometimes be overcome in a case where the alleged trade mark is in fact a description E of the goods, but is not recognised by the trade or the public as being such, and is taken by them as being a fancy name, e.g., where a chemical description, not generally known to the public, has been adopted, or where an unusual substance unknown to the public is being used in the manufacture. Where the words are purely descriptive, and in common F use, it is even more difficult to conceive a case in which they could acquire a secondary meaning.

It is, however, contended that in the present case such extreme difficulty has been surmounted, and that the evidence has established the fact that the words "shredded wheat" have acquired a secondary G meaning, and, when applied to biscuits, mean shredded wheat biscuits manufactured by the plaintiff company, and by no one else. Their Lordships therefore proceed to consider the evidence, calling attention, however, to the fact that the oral evidence was in point of time not specifically directed to the date when the trade mark was registered, H but referred to the time at which each particular witness was speaking, and was therefore more strictly relevant to the general question of passing off.

In the first place, it is of primary importance to see how the plaintiff company used the words "shredded wheat," i.e., to see whether it used them as a trade name or common law trade mark for the purpose of indicating the origin of the goods, or merely descriptively. It was said in argument that the way in which the plaintiff company used the words was irrelevant. Their Lordships do not agree with this contention. In endeavouring to ascertain what it is that indicates who is the manufacturer of goods, great weight must necessarily be attached to the steps which the manufacturer takes to indicate origin. Indeed, the foundation of the relief granted in the well-known case of *Reddaway* v. *Banham* (5), to which further reference must be made hereafter, was that the words there in question had been used by the plaintiff as a trade mark. There was no question in that case of a registered trade mark, but the plaintiff had used the words as a common law trade mark. As Lord Herschell phrased it, at p. 214 : " he has chosen to employ it as his trade mark." The opinions of Lord Shand and Lord Davey in *Cellular Clothing Co.* v. *Maxton & Murray* (6) attach the same importance to the user of the word in question by the person who is claiming that a descriptive word has acquired a secondary meaning as indicating exclusively his goods. Lord Shand said, at p. 338 :

> I am of opinion that the word is purely descriptive, and was so used by the appellants.

Lord Davey relied on the appellants' advertisements as showing that they used the word as descriptive of the goods, and not as indicating their origin. Further, in *Burberrys* v. *Cording (J. C.) & Co., Ltd.* (7), Parker, J., said that, in the absence of evidence of intention to deceive (and there is none such here), the inference of probability of deception must depend on the circumstances of each particular case, including the nature of the word or name the use of which is sought to be restrained. He adds the following observations most pertinent to the present case, at p. 987 :

> It is important for this purpose to consider whether the word or name is *prima facie* in the nature of a fancy word or name, or whether it is *prima facie* descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others.

Before and up to 1928 the plaintiff company's shredded wheat biscuits were sold in cartons, each containing 12 biscuits. On the top and bottom of each carton appeared the words " shredded whole wheat." On one of the broad sides there was a large picture of a factory, across the top front of which were the words " The Canadian Shredded Wheat Company, Ltd." Above it were printed the words (in large capitals) " shredded wheat," and (in smaller capitals) " made in Canada." Below it were printed the words " The Shredded Wheat Factory, Niagara Falls, Ontario." On the other broad side there were printed at the top in large capitals the words " shredded wheat," and underneath, in smaller type and parallel columns, a series of statements as to the merits of shredded wheat, and directions—such as :

> The crispness of its shreds promotes thorough mastication, which is the first

process in digestion. Heat the biscuit in the oven to restore crispness; then pour hot or cold milk over it, adding a little cream. Salt or sweeten to taste.

Below occur the following words, in capitals, and in separate lines as shown by hyphens:

> Heat the biscuit in oven to restore crispness — As made for 25 years — The
> A Canadian Shredded Wheat Co., Ltd. — Niagara Falls, Ont. :—Canada.

There is also a reference to a company in London, England, as being the European distributors. Occupying one of the narrower sides is found a picture of Niagara Falls, and on the picture appeared the words "The Home of Shredded Wheat, Niagara Falls, Ontario." On the other
B narrower side are found the words "the original shredded wheat," and, immediately underneath, the picture of a bowl containing one of the biscuits and a spoon resting in the bowl, with the words "trade mark." In addition, further below are found the words, "Twelve (12) biscuits," and, in quotation marks, "It's all in the shreds."

C A consideration of this carton, which was the form in which the biscuits were, at the relevant times, being sold throughout Canada, makes it clear, in their Lordships' view, that the plaintiff company was in no way using the words shredded wheat as indicative of the origin of the goods contained in the carton, but was using them only as descrip-
D tive of those goods. The indications of origin are the trade mark in association with the factory at Niagara Falls, and the name of the company, all of which are prominently displayed. By that carton the plaintiff company was telling the public as plainly as it could that shredded wheat need not necessarily be of its manufacture, but that it
E was the person who was the original manufacturer of the product known as shredded wheat. The plaintiff company was in fact using the words shredded wheat to indicate the thing, not the manufacturer, to indicate the stuff of which the biscuits were composed, not who made them.

An examination of such advertisements as have been put in evidence
F leads to the same conclusion. Exhibit No. 24 contains photostatic copies of ten advertisements which appeared in issues of *The Globe* newspaper of Toronto, during the years 1908, 1910, and 1913—at times, that is to say, while the patents were still in force. Three, which appeared in 1908, contain no indication of the manufacturer. They praise
G "shredded wheat." They recommend a biscuit for breakfast and a biscuit for luncheon, the article in each case being described as made of shredded wheat. One, which appeared in 1910, advertises "shredded wheat biscuits," urges people to try shredded wheat for breakfast, and acquire the shredded-wheat habit. This advertisement displays promi-
H nently the name of the plaintiff company, with the words added, "Niagara Falls, Ont." The remaining six all appeared in 1913. They all (except one) contain prominently the name and address of the plaintiff company, and in addition the picture of the bowl with a biscuit inside, and a spoon resting in the bowl. The bowl is steaming, and there is no reference to a registered trade mark. The exception is an advertisement of

triscuit, which is described as "the shredded whole wheat wafer." In none of these is there any user of the words "shredded wheat" as indicative of the manufacturer of the biscuit or triscuit. The words are used merely as describing the substance of which the biscuit and triscuit are composed. Exhibit No. 40 contains a series of advertisements which appeared in *The Globe* between May 1, 1913, and A
Apr. 30, 1915. Down to the end of 1914, the advertisements of the biscuits all contain prominently the plaintiff company's name and address, a picture of the bowl, biscuit and spoon, and the words "shredded wheat," to describe the stuff of which the biscuit is made. In 1915, the name of the plaintiff company drops out of the advertisements, B
but the picture of the bowl, etc., continues, and in addition the following words occur, "Made at Niagara Falls, Ontario." In these advertisements also the words "shredded wheat" are used merely as describing what is the composition of the biscuits and triscuits. They invariably state it thus: "Shredded wheat is made in two forms, biscuit and C
triscuit." Other advertising-matter was put in evidence, viz., a collection of advertisements in the United States by the United States company which was manufacturing shredded wheat at Niagara Falls, N.Y. These advertisements become admissible and relevant only by reason of the evidence given by Mr. Edwin Wallace. Mr. Wallace had been with the D
U.S.A. company at Niagara Falls, N.Y., from June, 1901, until about 1904 or 1905, when he became superintendent of the plaintiff company, a post which he held until 1924. Mr. Wallace was asked to look at Exhibit 10 and to state whether that was the way in which, during his association with the plaintiff company, the product had been advertised E
and described, and he replied: "This is the advertising which has been carried on for many years." In these advertisements also the words "shredded wheat" are used descriptively, and not as indicating the exclusive manufacture of any person. As an instance, the public is warned: F

> Look for the picture of Niagara Falls on the carton when you buy shredded wheat biscuit. Any other shredded wheat that may be offered you is merely a poor imitation of the only original shredded wheat.

Again:

> When you ask for shredded wheat be sure you get the original shredded wheat G
> you have always eaten, made at Niagara Falls, N.Y.

In the face of the use by the plaintiff company of the words "shredded wheat" as appearing on the carton and in the advertisements, it would appear to their Lordships difficult to believe that the words "shredded wheat" could have acquired a secondary meaning indicating goods H
exclusively manufactured by the plaintiff company. It is, however, claimed by the plaintiff company that the oral evidence establishes the fact. This necessitates a consideration of that evidence.

Three classes of witnesses (some 27 individuals) were examined on commission, viz., consumers, retail grocers, and wholesale grocers.

They came from every province of Canada with the exception of Ontario and Quebec, but a formal admission was made on behalf of the defendants that similar witnesses from those provinces would, if examined on commission, testify to the same effect. It may thus be taken that the evidence, such as it is, covers the whole Dominion. Without analysing it in detail, it may be stated that, in their Lordships' opinion, it falls far short of establishing that in 1928, or indeed at any time, the words "shredded wheat" had acquired a secondary meaning which meant that the goods to which they were applied were the manufacture of the plaintiff company and of no one else. The questions (couched often in a leading form) and the answers given are full of ambiguity. It must be remembered that "shredded wheat" was not only the name given by the inventor to a new product which could be baked into a biscuit, but was also descriptive of the product as to both its composition and its appearance. It must also be remembered that for a lengthy period the plaintiff company enjoyed a legal monopoly of making and selling in Canada the product shredded wheat baked into biscuits, and that, with the negligible exception of some shredded wheat biscuits called muffets, the plaintiff company continued to be the sole maker of the product, baked or otherwise. In these circumstances, it was inevitable that the words "shredded wheat" and shredded wheat biscuits should become associated in Canada with the goods of the plaintiff company, since many members of the public would get to know that the product shredded wheat was in fact the plaintiff company's product.

This, however, is far from establishing the required meaning of distinctiveness, which must carry with it the feature that the goods distinguished are the goods manufactured by a particular person, and by no other. A word, or words, to be really distinctive of a person's goods, must, generally speaking, be incapable of application to the goods of anyone else. It is on this point that the evidence breaks down. It is full of ambiguities. One is left in doubt as to whether a witness, in speaking of shredded wheat, refers to the baked biscuit or to the material of which it is composed, and the answers of many are inconsistent with the witness really believing that the words "shredded wheat" necessarily indicate goods manufactured by the plaintiff company exclusively, and by no one else. It is sufficient to say that it fails to show that the words "shredded wheat," which were both the name of, and descriptive of, Perky's invented product, ever acquired the secondary meaning of being distinctive of goods manufactured exclusively by the plaintiff company. It would, in their opinion, be passing strange if they had acquired such a meaning, for it would be a meaning directly contrary to the sense in which those words had been put forward to the public by the plaintiff company in its cartons and advertisements. The circumstances existing in the present case, and the extreme difficulty of the plaintiff company succeeding in establishing the desired secondary meaning, are exactly those which are described by LORD DAVEY in the well-known case of *Cellular Clothing Co.* v. *Maxton & Murray* (6), at pp. 343, 344, which passage has been aptly cited by McTAGUE, J., in his judgment in the present case.

It was contended that McTAGUE, J., had found the facts upon the issue of distinctiveness in favour of the plaintiff company, but their Lordships are unable so to read his judgment. Had he done so, he must, A
they think, have granted relief against infringement of trade marks. He states that the general effect of the evidence is that the words "shredded wheat" mean to the witnesses the goods of the plaintiff company. In view of the monopoly enjoyed under the patent, and the monopoly subsequently in fact enjoyed, the words must necessarily B
be identified with the plaintiff company's goods; but, in view of those exceptional circumstances, the judge holds that the requisite secondary meaning of exclusive distinctiveness has not been established. To quote his words:

> C
> On the branch of the issue having to do with infringement of the trade mark, the conclusion must be that the words whose use is complained of are common words, merely descriptive, and have not acquired a secondary meaning in such manner as to give the plaintiff the relief sought.

Their Lordships agree with this finding, which also had the approval of the Court of Appeal. D

In the result, their Lordships agree with both the Ontario courts in holding that the registrations of the plaintiff company's trade marks "shredded wheat" were invalid, and that, so far as the action is based on infringement of trade marks, it fails.

The same result must, they think, ensue in regard to passing off, E
so far as the alleged passing off is based on the use of the words "shredded wheat." Once it is established that these words are both the name of a product and descriptive of that product, the difficulty of establishing a passing off merely by the use of those words in relation to the product is extreme. The case mainly relied upon by the plaintiff company F
was *Reddaway* v. *Banham* (5) already referred to. In that case, the use of words which in fact described the belting there in question, and which in a sense could be said to be its name, was restrained, on the ground of passing off. The facts in that case were exceptional and peculiar, and have no real relation to the facts of the present case. For years G
different manufacturers of belting had made belting consisting of a yarn which was in fact principally composed of camel hair, but which was not known to contain in fact camel hair. Each manufacturer had given the distinctive name of some animal to his belting; e.g., yak, buffalo, llama, crocodile, etc. The plaintiff had identified his with the H
camel, and everyone concerned was under the impression that the plaintiff's name camel-hair belting was a fancy name, and in no way descriptive. The defendants Banham began in 1891 to make belting made of yarn like the plaintiff's, and gave it the name of the plaintiff's belting, camel-hair belting. Upon the facts of that case, a jury found,

and no wonder, that the words (though descriptive in fact of the goods) meant the plaintiff's belting, as distinct from the belting of other manufacturers. The decision is one easily to be accounted for on the special facts, namely, that owing to the general but mistaken belief that camelhair was a fancy name, the requisite secondary meaning had in fact been acquired. The plaintiff company's action must, in their Lordships' opinion, fail, so far as it is based on the use of the words "shredded wheat," with the result that, as against the defendant Bassin, the action was properly dismissed.

The plaintiff company, however, claims as against Kelloggs a passing-off injunction based upon the allegation that Kellogg's biscuits are of such shape and size that hotel-keepers and restaurant-keepers could, if so minded, supply them in response to the request of a customer who, in asking for shredded wheat, desired to be supplied with biscuits of the plaintiff company's manufacture. Their Lordships see no reason for granting any such relief, upon the evidence given in the present case. They are not satisfied that a person asking for shredded wheat will not have his request truly satisfied if the product shredded wheat, as manufactured by Kelloggs or any other manufacturer, is supplied. Nor are they satisfied that a customer who really desires a biscuit of the plaintiff company's manufacture will necessarily be deceived by being offered a biscuit of the same shape but perceptibly smaller. Such likelihood of deception requires to be proved, and it is noticeable that no witness was shown a Kellogg's biscuit and asked whether he would have taken that to be a biscuit of the plaintiff company's manufacture. The plaintiff company has not, in their Lordships' opinion, made out a case in these proceedings which would justify the granting of a passing-off injunction based solely on the form of the biscuit.

Some further observations their Lordships think it desirable to make. Their decision has been reached without basing it specifically upon the existence of patents which have expired. Their Lordships, however, find it difficult to conceive that a manufacturer could in such a case be held guilty of passing off, if he manufactured the goods in accordance with the expired patents, and the only similarity between the rival goods lay in the appearance of the goods so manufactured and the application to them of the name by which the patented goods had been known. It is conceivable that, in the case of a patent long ago expired, the evidence might possibly establish that the name had become distinctive of a particular manufacturer rather than descriptive of the goods, with the result that other manufacturers of the goods could be compelled to adopt some means of effectively distinguishing their goods from those of the particular manufacturer. Difficult as such a case is to prove in the case of a descriptive word, it must be additionally difficult in the case where a word is the name of goods as well as being descriptive of those goods. The case of *William Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.* (8) was peculiar, in that the goods there in question which were offered for sale were pieces of washing-blue, while the special form of stick which the defendants were restrained from associating with their pieces of washing-blue was in effect part of the get-up of the plaintiff's goods. In *Boake (A.), Roberts & Co., Ltd.* v. *Wayland (W. A.) & Co., Re Boake (A.), Roberts & Co., Ltd.'s, Trade Marks* (9), while the name of the patented article was "Kalium Meta Sulphite," or, more technically "Meta Sulphite of Potassium," the letters or initials K.M.S. were proved to distinguish in the brewing trade the Kalium Meta Sulphite, or Meta Sulphite of Potassium, manufactured by the plaintiffs, from the same article of other persons who were making it and calling it by various other names. The defendant was restrained from applying the letters or initials K.M.S. to his goods. In the case of *Edison Storage Battery Co.* v. *Britannia Batteries, Ltd.* (10), the distinctiveness was proved by admissions made by the defendants themselves, but for which, as Bennett, J., pointed out, the plaintiffs would have had difficulty in satisfying the court that descriptive words had become distinctive. Moreover, the plaintiffs' task in that case was clearly rendered less difficult by the fact that the words there in question included the actual name of the inventor. Each of these cases presented some peculiar feature which brought the necessary proof within the range of possibility.

One further observation their Lordships desire to make. Litigation has taken place in the United States of America in which a company called National Biscuit Company sought to restrain a company called Kellogg Company from using the words "shredded wheat." The action (10) was dismissed by decree of the U.S. district court for the district of Delaware, and, on appeal to the U.S. circuit court of appeals for the third circuit, the decree was affirmed. Subsequently, on reargument before the same judges, that decision was reversed, and a decree was entered:

> enjoining the defendant from the use of the name "shredded wheat" as its trade name, and from advertising or offering for sale its product in the form and shape of plaintiff's biscuit in violation of its trade mark.

Their Lordships can only (but with the greatest respect for the court) express the view that, if the facts of that case were similar in all respects to the facts of the present case, they prefer the first judgment of the circuit court of appeals to its later decision. Their Lordships are of opinion that this appeal should be dismissed, and will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors: *Blake & Redden* (for the appellants); *McKenna & Co.* (for the respondents).

Reported by T. A. Dillon, Esq., *Barrister-at-Law.*]

CHAPMAN *v.* CHAPMAN & THOMAS (TAYLOR intervening).

[PROBATE, DIVORCE & ADMIRALTY DIVISION (Hodson, J.), **February 1, 2, 18, 1938.**]

Divorce—Husband's petition prior to 1938—*Further answer after* 1937 *alleging desertion—Leave to file new petition given to wife during hearing—Desertion—Whether interrupted by filing of petition by husband—Whether desertion interrupted by cross-prayer of wife—Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (*c.* 49), *s.* 180—*Matrimonial Causes Act*, 1937 (*c.* 57), *s.* 2 (*b*).

On June 12, 1935, a husband presented a petition for dissolution of marriage founded on adultery. On June 27, 1935, the wife filed an answer denying the adultery, cross-charged her husband with adultery and desertion, and prayed for the dissolution of the marriage. The charges of adultery were held at the trial not to be proved. On Jan. 11, 1938, before the trial, by a further answer the wife alleged that the husband had deserted her without cause for a period of at least three years immediately prior thereto. At the hearing the wife was given leave to file and present a new petition containing the same allegations as were contained in the further answer of Jan. 11, 1938. The reply of the husband was ordered to stand as an answer to this new petition, and the suits were consolidated. It was contended that the petition of the husband, which was presented exactly two years after he had left his wife, put an end to the period of desertion, or, in the alternative, that the wife by her original answer put an end to the period of desertion :—

HELD : (i) the further answer of Jan. 11, 1938, was part of the original petition, and therefore the prayer for divorce on the ground of desertion could not properly be included in it.

(ii) the husband could not by his own act prevent desertion from running against him.

(iii) the husband having taken the step which effectively prevented the wife from returning to him, nothing that the wife did afterwards by way of prosecution of proceedings prevented desertion from running against the husband.

(iv) the wife was entitled to a decree of divorce upon the petition filed by leave during the hearing.

[**EDITORIAL NOTE.** The points on desertion taken in this case apply the decisions in previous cases to the provisions of the 1937 Act, under which the question of desertion becomes more important. It was attempted in this case to make the provisions of the new Act available to the wife by means of a further answer to a petition filed before the Act came into force. This attempt failed, but the wife was allowed to file a new petition during the hearing, and to have the suits consolidated.

AS TO INTERRUPTION OF DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 658, para. 968 ; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to :

(1) *Sandler* v. *Sandler*, [1934] P. 149 ; Digest Supp. ; 103 L.J.P. 88 ; 151 L.T. 313.

(2) *Stevenson* v. *Stevenson*, [1911] P. 191 ; 27 Digest 320, *2986* ; 80 L.J.P. 137 ; 105 L.T. 183.

(3) *Kay* v. *Kay*, [1904] P. 382 ; 27 Digest 308, *2850* ; 73 L.J.P. 108 ; 91 L.T. 360.

(4) *Knapp* v. *Knapp* (1880), 6 P.D. 10 ; 27 Digest 320, *2981* ; 49 L.J.P. 69 ; 43 L.T. 384.

(5) *Blandford* v. *Blandford* (1883), 8 P.D. 19 ; 27 Digest 338, *3175* ; 52 L.J.P. 17; 48 L.T. 238.

Cross-petition for divorce by wife on the ground of desertion, substituted for wife's further answer to husband's petition (which failed) for divorce on the ground of adultery.

J. Roland Adams for the husband.

Hon. Ewen Montagu and *Peter Bristow* for the wife.

Hodson, J. : The original petition for dissolution of marriage in this case was presented by the husband on June 12, 1935, and contained an allegation of adultery by the wife with the co-respondent. The co-respondent took no part in the proceedings.

By her answer, filed on June 27, 1935, the wife denied the adultery alleged against her, cross-charged her husband with adultery and desertion, and also prayed for dissolution of the marriage. By a pleading described by its introductory words as a further answer, and in the body of it as a supplemental answer, dated Jan. 11, 1938, the wife alleged that the husband had deserted her without cause for a period of at least three years immediately preceding the filing of the answer, and prayed as before. The husband replied denying the allegations of his wife.

The suit was contested before me by the wife, the husband and the woman named in the wife's petition, who intervened in the suit. During the course of the hearing, the charge of adultery made against the intervener was rightly withdrawn, the wife and her advisers being satisfied that medical evidence was available to prove that at all material times the intervener was a virgin.

At the conclusion of the evidence, I found that the charge of adultery made against the wife had failed, and took time to consider my judgment on the question of desertion and the wife's right to a dissolution of her marriage under the Matrimonial Causes Act, 1937, which came into operation on Jan. 1, 1938. The relevant part is sect. 2 (*b*), which, so far as is material to the present case, reads as follows :

> A petition for divorce may be presented to the High Court (in this part of this Act referred to as "the court") either by the husband or the wife on the ground that the respondent. . . . (*b*) has deserted the petitioner without cause for a period of at least 3 years immediately preceding the presentation of the petition.

The first question is whether or not I can pronounce a decree on this ground at all, since the proceedings were founded on a petition presented before the Act of 1937 came into operation, and I have to consider whether or not the pleading dated Jan. 11, 1938, to which I have referred, could be properly described as a petition presented after Jan. 1, 1938.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 180, provides :

> If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion, or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

If, therefore, the pleading of Jan. 11, 1938, had stood alone, the matter could, I think, have been disposed of as if that pleading had been an original petition. It was, however, a further answer to the petition, and concluded by a reference to the prayer of the first answer, which was, of course, filed long before Jan. 1, 1938. It is thus, in form at any rate, in the nature of a supplement to the first answer, and a question arose as A to whether or not it could stand by itself, having regard to the decision of the Court of Appeal in *Sandler* v. *Sandler* (1), which made it clear that a supplemental petition for divorce is not a supplemental petition, but is part of the original petition. In my judgment, it could not, and I accordingly, at the hearing, gave the wife leave to file and present a B petition containing the same allegations as were contained in the so-called further answer, and directed the reply of the husband to stand as an answer to that petition, and ordered the suits to be consolidated.

The second question is whether or not the period of desertion was uninterrupted. The facts of the case are simple. On June 11, 1933, the C husband left the wife, and there is no doubt that the reason for his departure was his suspicion about her relationship with the co-respondent. It was common ground before me that, if those suspicions were unfounded, the husband had, in fact, deserted his wife, and his desertion continued until the trial, unless interrupted by the institution of D proceedings. The petition for divorce instituted by the husband almost exactly two years after he left his wife effectively prevented his wife returning to him so long as that suit was being maintained. It cannot, in my opinion, be contended that the husband could in that way by his own act prevent desertion running against him, but the wife E by her original answer, filed within the three-year period, by which she prayed for dissolution, may be said to have put it out of her husband's power to return to her, and thus to have prevented desertion running against him.

SIR H. H. COZENS HARDY, M.R., delivering the judgment of the F Court of Appeal in *Stevenson* v. *Stevenson* (2), referring to a wife who had taken proceedings for divorce against her husband on the ground of adultery and desertion, said, at p. 194:

> At the date of the petition there had not been desertion for two years, such as is required by the statute. The desertion had lasted eighteen months only. The G presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away.

In the case before me, however, it was the husband who took the step which effectively prevented the wife from returning to him, and in my H view nothing which the wife did afterwards by the presentation or prosecution of her proceedings altered the position. The obstacle was put up by the husband, and, so long as it stood in her way, no action taken by the wife prevented desertion from running against the husband.

The Court of Appeal in the case I have mentioned referred with approval to the very careful judgment of GORELL BARNES, J., in *Kay* v. *Kay* (3).

There, referring to an earlier case of *Knapp* v. *Knapp* (4), a decision of Sir J. Hannen, Gorell Barnes, J., said at p. 393 :

> This is the really important passage, to my mind, which affects the view I entertain about the matter : "There never was a time at which the petitioner was bound to go back and live with him, because she was always justified in refusing to do so as long as he continued to live with the woman for whose company he had abandoned her ; and, therefore, as it was in the beginning desertion on his part, A
> and the circumstances have never been changed, that state of things, which was a desertion in the first instance, has continued such for now more than two years ; and consequently the petitioner is entitled to succeed."

In this case, not only was the wife justified in refusing to go back to her husband so long as the divorce proceedings were maintained against B
her, but also it was practically impossible for her to do so, and I find that the desertion of the husband continued from June 11, 1933, until the trial.

I need add only that it is to be observed that the cases to which I have referred deal with proceedings instituted under the Matrimonial C
Causes Act, 1857, and had to do with a period of desertion without reasonable excuse for two years and upwards, whereas this case falls to be decided under the provision of the Matrimonial Causes Act, 1937, which had to do with a period of at least three years' desertion without cause immediately preceding the filing of the petition. I see no distinction D
between the words " without reasonable excuse " and the words " without cause," which latter words were formerly used in conjunction with desertion in judicial separation proceedings under sect. 16 of the Act of 1857. The desertion relied on must, however, immediately precede the presentation of the petition in order to be a ground for dissolution under E
sect. 2 (*b*) of the Act of 1937, whereas, by the old law, as in the case of *Blandford* v. *Blandford* (5), the desertion for two years relied upon as part of the foundation for divorce proceedings might have been completed and condoned by subsequent reconciliation, yet so as to form, with the subsequent adultery, the basis of a petition for divorce. There will F
be a decree *nisi* on the petition of the wife.

Solicitors : *John B. de Fonblanque* (for the husband) ; *Hunt & Hunt* (for the wife).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

Re WARWICK'S SETTLEMENT TRUSTS, GREVILLE TRUST CO. *v.* GREY.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **January 14, 17, 18, February 18, 1938.]**

Settlement—Jointure and interest on portions—Charged primarily on income—Charged also on capital—Deficiency of income—Paid voluntarily by tenant for life—Recoupment from capital.

A tenant for life of settled estates assigned all his life interest under the settlement to a company. A jointure annuity and the interest of certain portion sums were charged on the income as well as the capital of the settled estates, and under the charge the income of subsequent years was charged to meet arrears of interest. In the years ending Mar. 31, 1933, 1934, 1935, respectively, the income was insufficient to meet these interest charges, and the company voluntarily, and without reference to any other party interested in the settled estates, paid that interest out of other money belonging to it. The company asked for a declaration that the interest so paid was a charge upon the capital of the settled estates :—

HELD : the payments had been made without any intention to claim a charge on capital, and the presumption that there would be such a charge was rebutted.

Per SIR WILFRID GREENE, M.R. : where a tenant for life pays interest or other income payment out of his own money, he is entitled to a charge on corpus. A tenant for life so paying money that is a continuing charge on income has not to wait until the sale of the estate or the termination of his interest to be recouped out of capital in respect of such expenditure.

Appeal from the decision of FARWELL, J. ([1937] 2 All E.R. 828) *dismissed.*

[EDITORIAL NOTE. In general, interest is payable out of the income of the settled estates, but here the interest is expressly charged, primarily upon the income, and also upon the capital of the settled estates. The position arising upon the voluntary payment by the tenant for life out of his own moneys other than the income of the settled property has not been fully decided, and, if properly advised, he would do so only upon some proper agreement with those entitled in remainder. The Court of Appeal, though they have dismissed the appeal, have proceeded on lines of reasoning rather different from those of FARWELL, J., in the court below. SIR WILFRID GREENE, M.R., does not agree with the statement that a tenant for life has to wait for the termination of an accounting period. There is also a divergence of opinion between SIR WILFRID GREENE, M.R., and CLAUSON, L.J., as to whether a tenant for life can have a charge upon the capital for an interest payment which may possibly be recouped out of subsequent income.

AS TO CHARGE ON CORPUS FOR INTEREST PAYMENT, see HALSBURY, 1st. Edn., Vol. 25, p. 619, para. 1090; and FOR CASES see DIGEST, Vol. 40 pp. 694, 695, Nos. 2298-2309.

Cases referred to :

(1) *Adams* v. *Angell* (1877), 5 Ch.D. 634 ; 20 Digest 513, *2419* ; 46 L.J.Ch. 54, 352 ; 36 L.T. 334.

(2) *Thorne* v. *Cann*, [1895] A.C. 11 ; 20 Digest 507, *2354* ; 64 L.J. Ch.1 ; 71 L.T. 852.

(3) *Kensington (Lord)* v. *Bouverie* (1859), 7 H.L. Cas. 557 ; 35 Digest 624, *3592* ; 29 L.J.Ch. 537 ; 34 L.T.O.S. 16.

(4) *Cooke* v. *Cholmondeley* (1858), 4 Drew. 326 ; 40 Digest 650, *1892* ; 27 L.J.Ch. 826 ; 32 L.T.O.S. 59.

(5) *Burrell* v. *Egremont* (*Earl*) (1844), 7 Beav. 205; 20 Digest 512, *2409*; 13 L.J.Ch. 309.
(6) *Honywood* v. *Honywood*, [1902] 1 Ch. 347; 40 Digest 691, *2269*; 71 L.J.Ch. 174; 86 L.T. 214.
(7) *Re Croxon, Ferrers* v. *Croxon*, [1915] 2 Ch. 290; 39 Digest 159, *517*; 84 L.J.Ch. 845; 113 L.T. 1103.
(8) *Re Grant, Walker* v. *Martineau* (1883), 52 L.J.Ch. 552; 39 Digest 173, *633*; 48 L.T. 937.
(9) *Playfair* v. *Cooper, Prince* v. *Cooper* (1853), 17 Beav. 187; 39 Digest 151, *446*; 23 L.J.Ch. 341; 21 L.T.O.S. 177.

APPEAL from an order of FARWELL, J., dated Apr. 28, 1937, and reported in [1937] 2 All E.R. 828, where the facts and documents are fully set out.

Cyril J. Radcliffe, K.C., and *A. Guest Mathews* for the appellants, the plaintiff company.

R. F. Roxburgh, K.C., and *L. W. Byrne* for all the respondents except the Earl of Warwick and the trustees of the will other than Lady Warwick.

G. P. Slade for the Earl of Warwick.

H. O. Danckwerts for the trustees of the will.

Radcliffe, K.C.: On the question of mismanagement, every possible effort has been made to find a suitable tenant. The company, by paying the sums charged on the property out of moneys belonging to them, have relieved capital. They are therefore entitled to recoup themselves out of the corpus of the settled property. [Counsel referred to *Burrell* v. *Egremont* (*Earl*) (5), *Kensington* (*Lord*) v. *Bouverie* (3), *Honywood* v. *Honywood* (6), *Re Croxon, Ferrers* v. *Croxon* (7), *Re Grant, Walker* v. *Martineau* (8).]

Slade: I adopt the argument of *Radcliffe, K.C.*, so far as it deals with the question of mismanagement.

Roxburgh, K.C.: The remainderman is entitled to object to the company paying the jointress out of their own pocket and then claiming recoupment from the estate, because there is always the possibility that, when there is a deficiency of income, the jointress may be willing to make a sacrifice, the benefit of which would, of course, enure to the remainderman. [Counsel referred to *Prince* v. *Cooper* (9).]. The facts of this case bring it exactly within the principle of *Kensington* (*Lord*) v. *Bouverie* (3).

Radcliffe K.C., in reply.

SIR WILFRID GREENE, M.R.: By an indenture of settlement dated Apr. 28, 1909, and made upon the marriage of the sixth Earl of Warwick (then Lord Brooke), the Warwick estates, to which Lord Brooke was then absolutely entitled in reversion expectant upon the death of the fifth Earl, were charged with a jointure rentcharge in favour of his wife, and with portions in favour of the younger children of the marriage. In the events which happened, the amount of the jointure rentcharge created by the settlement was £3,000. It was charged on the whole of the Warwick estates, and was payable quarterly, interest being payable on any instalment remaining unpaid for more than one quarter. By way of additional security, the estates were demised to trustees for a term of 500 years, under which they were entitled, on the estates falling into possession, to raise the amount of the jointure rentcharge, with interest and any arrears, either out of the rents and profits, or by sale of timber or minerals, or by mortgage for the whole or part of the term.

In the events which happened, the sum charged for portions under this settlement amounted to £15,000. The settlement charged the estates with interest on the portions at 4 per cent. per annum, and the portions and the interest thereon were further secured by a term of 2,000 years granted to the trustees. Under this term, the trustees had, for the purpose of raising the portions and interest, powers similar to those conferred upon them in relation to the jointure rentcharge.

The fifth Earl of Warwick died on Jan. 15, 1924. By his will dated Feb. 11, 1924, the sixth Earl devised the Warwick estates to trustees upon trusts under which, for an extended period defined so as not to infringe the rule against perpetuities, the Earl of Warwick for the time being was to have a life estate, with remainder at the expiration of the period to the then Earl of Warwick in tail male. By a second codicil, dated Dec. 16, 1925, the sixth Earl bequeathed to his wife during her life an annuity of such an amount as would make up the £3,000 to that amount free from income tax and super-tax (cl. 3). By cl. 4 he bequeathed to his trustees the sum of £10,000 for each younger son who should survive him, with interest at 5 per cent. per annum from his death. By cl. 6 he charged the Warwick estates settled by his will with the payment (in aid of his residuary estate) of the annuity and the sums bequeathed by cl. 4, and he declared that those sums should be in addition to the portions sum provided by his marriage settlement. By cl. 11 of his will his residuary estate was to be invested in freehold hereditaments for an estate in fee simple, which were to be held upon the same trusts as the estates thereby settled.

The sixth Earl died on Jan. 31, 1928, and thereupon his eldest son succeeded to the title as seventh Earl, and became entitled to an estate for his life in the Warwick estates and the residuary estate settled by his father's will. There were two other children—namely, the respondents Richard Francis Maynard Greville and John Ambrose Henry Greville. The Dowager Countess, widow of the sixth Earl, who is entitled to the jointure rentcharge under the settlement and the annuity under the will, is also a respondent.

By an agreement dated Apr. 1, 1932, the seventh Earl agreed to sell to the appellants his equitable life estate under the will of the sixth Earl. The sale became effective at the date of the agreement, but no assignment has been executed. The appellants own other property as well as the life interest.

In each of the three years ending Mar. 31, 1933, 1934, and 1935, respectively, the income of the settled property was insufficient to meet the jointure rentcharge under the marriage settlement, the annuity given to the Dowager Countess by the will of the sixth Earl, and the interest on the portions. The deficiency was made up by the appellants out of the income of the other property belonging to them. In these proceedings, the appellants seek to establish a right to a charge upon the settled property, in respect of the sums so paid, to make up the deficiency.

The first question which arises for consideration may be thus stated. Where the rents of a settled estate are insufficient to keep down an incumbrance, which, although charged both on income and on corpus, is primarily to be discharged out of income, and the tenant for life makes up the deficiency out of his own pocket, is it competent for him to keep the charge alive for his own benefit in such a way as to give him an immediate right of recourse against corpus, or is he bound to wait until the termination of his life estate in order to see whether or not, on a final account being taken between income and corpus, any balance is due to him? In considering this question, there are two propositions which can be asserted at the outset without fear of contradiction. One is that, where a limited owner discharges by payment an incumbrance upon the corpus of the settled property which he is under no personal obligation to discharge, he is entitled to keep the incumbrance alive for his own benefit, and to enforce it according to its terms. The other is that, in the absence of any indication to the contrary, his intention to keep the incumbrance alive will be presumed. These principles are so familiar that authority is scarcely necessary, but, as they are the starting point of the argument, I will give two quotations. In *Adams* v. *Angell* (1), Sir George Jessel, M.R., said, at p. 645:

> Now in a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit.

In *Thorne* v. *Cann* (2), Lord Macnaghten said, at pp. 18, 19:

> Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot.

It is important to notice the language used in these passages to describe what happens when the limited owner discharges the incumbrance. It is not that he thereby becomes entitled, in some account between himself and the remainderman, to be recouped what he has paid. The incumbrance is "kept alive for his benefit." This is no picturesque expression. It describes what, in the contemplation of equity, is the true result. Precisely the same thing happens when an absolute owner pays off a charge, the only difference being that in his case some indication of intention to keep the charge alive is in general required, whereas in the case of the limited owner such intention is in general presumed, from the circumstance that it would be for his benefit to do so. The passage cited from the opinion of Lord Macnaghten deals with both cases, and A with regard to each he uses the expression "keep alive the charge for his benefit." In the case of the absolute owner, the charge can be kept alive by a mere declaration of intention in the deed of reconveyance when the charge is paid off. There is no need to have the reconveyance made in favour of a nominee, or to resort to any similar conveyancing B device. Such a declaration sufficiently evidences the intention of the owner who pays off the charge—that, indeed, is its only importance—and, his intention being so established, the charge remains alive, and can be enforced by him according to its terms. It is the same in the case of the limited owner whose intention is presumed; the charge remains, C the benefit of it becomes vested in him when he pays it off, without the necessity of any assignment, and he can enforce it according to its terms. The persons interested in the corpus have no equity whatever to object to the exercise by the limited owner of the right so acquired by him. What has taken place is a matter with which they have no D concern. Their position is made no worse than it would have been if the owner of the charge had himself enforced it, or had assigned it to another person who enforced it. The position of the limited owner is in effect the same in the contemplation of equity as that of an assignee of the charge; he gets those rights against corpus which the charge E confers, no more and no less. This is what is meant by "keeping the charge alive for his own benefit."

In the present case the charges with which we have to deal are charges on corpus, but they are also, and primarily, continuing charges on income. That is to say, as between themselves and those interested in corpus, F the appellants, as tenants for life, are bound to keep them down out of the income of the property charged, so far as it is sufficient for the purpose. This obligation admittedly extends so as to impose upon the tenant for life the obligation, where resort has been had to capital to make good a deficiency in any year, to reimburse capital out of surplus income G (if any) in subsequent years. It is said that these circumstances entirely alter the position of the tenant for life who pays off the deficiency out of his own money. It is said that his right to keep the charge alive for his own benefit, if it exists at all, changes its character, and, so to speak, becomes a mere right to have paid to him the balance (if any) H which shall be due to him after his obligation to reimburse corpus out of subsequent surpluses has been discharged. In other words, his right to keep the charge alive for his own benefit becomes, as it were, merged in a general accounting equity as between tenant for life and remainderman. This, of course, involves the consequence that the tenant for life cannot obtain payment during his life, because it is not until his death that the account can be taken. This in effect is what FARWELL, J., has held in the present case.

What all respect to those who think otherwise, I can find no support, either in principle or in authority, for this conclusion. In my opinion, it ignores the true facts of the position which arises when a tenant for life pays off a charge on the estate, and confuses two quite separate equities, each of which arises out of entirely different and disconnected facts. The equity of the remainderman to have surpluses applied in making good to corpus what has been taken from it to meet a deficiency arises from the fact that the charge is a continuing charge on income, and must be kept down out of income, so far as it is sufficient for the purpose. This equity arises where the owner of the charge has enforced it against capital; it would have arisen in the present case if the trustees on behalf of the jointress and the portioners had exercised their powers of raising the deficiency out of corpus. In respect of this equity, if the appellants are right, the position of those interested in corpus will be precisely the same as it would have been in that event, no better and no worse. Why, in view of this, the tenant for life should be penalised, I must confess I am at a loss to understand. If, by giving effect to the charge in favour of the tenant for life, the position of those interested in corpus were to be in some way prejudicially affected in regard to this equity, different considerations would, of course, apply. But it will not. The equity will remain in full force, and that is because it is an equity separate from, independent of, and unaffected by, the right of the tenant for life to keep alive for his own benefit the charge on corpus which he has paid off. The nature and origin of that right I have already discussed. It arises, not, as is the case with the other equity, out of the mutual relationship of tenant for life and remainderman, as regulated by the terms of the instrument creating the charge, but out of a separate transaction altogether, in which the tenant for life stands in the relationship of a third party, and acquires by his action rights against corpus which had previously belonged to someone else. To deprive him of those rights, or to postpone the exercise of them, is a thing for which I can see no justification. It would merely impose a gratuitous hardship on the tenant for life. When the deficiency arises, the tenant for life is not in default. He has discharged his obligation to keep down the charges out of income, so far as it will go. The owner of the charge is entitled to have recourse to corpus for the deficiency. If the tenant for life pays the amount of the deficiency out of his own money, why should his right to enjoy the benefit of the charge be postponed, on the chance that, in some future years, there may be surplus income for which he will be liable to account? If, in the present case, the trustees had raised the amount of the deficiency by mortgage, the tenant for life might well have been the lender of the money. Could it have been said that his right to enforce the mortgage ought to be postponed until it could be ascertained whether or not in subsequent years there was a surplus of income? I apprehend not. I can see no difference in principle between the case where the money is advanced on mortgage by the tenant for life to the trustees and that where it is paid direct by the tenant for life to the chargees in such circumstances as would keep the charge alive for his benefit in accordance with general principles.

A It is said that difficulties would arise if the tenant for life were to assign his charge, since the assignee would not be liable to account for subsequent surpluses. I agree that he would not. The tenant for life would clearly remain liable, however, and the remainderman's rights in respect of surpluses would remain unaffected. To my mind, the case of such a B transfer illustrates and confirms the appellants' argument, for the resulting situation makes plain the separate and distinct natures of the two equities, the equity which the tenant for life derives through the chargee whom he has paid off and the equity of the remainderman, which arises by reason of the relationship between himself and the C tenant for life under the terms of the settlement.

I have hitherto assumed that the principle under which a limited owner is entitled to have a charge kept alive for his own benefit applies to the case where the charge is (as between tenant for life and remainderman) primarily a continuing charge on income. On principle, I should D have thought that this was unquestionably the case, but that it is the case has, in my opinion, been recognised by the House of Lords, in *Kensington* (*Lord*) v. *Bouverie* (3), which was fully discussed before us. I do not propose to refer in detail to the opinions delivered in that case, which must be read with reference to the facts with which they were E dealing, but all the noble and learned Lords did, in my opinion, recognise the right of a tenant for life who, when the rents are insufficient, pays off such a charge out of his own money to keep it alive for his own benefit. The point upon which the majority and minority differed was the question as to whether or not, upon the particular facts of the case, the necessary F intention to keep the charge alive ought to be imputed to the tenant for life.

Upon the question which I have been discussing, I differ, with all respect, from the conclusions of the judge, for reasons which sufficiently appear. His view that the tenant for life must wait until his tenancy G comes to an end—or possibly until the estate is sold, an alternative which I must confess I do not quite understand—gives rise to a practical difficulty. Admittedly, the tenant for life making a claim against corpus may, in some circumstances, be called upon to show that his management of the estates has not been such as to make the income H from rents less than it ought to have been. If the investigation of matters of fact of this kind is to be postponed until the tenant for life is dead—possibly many years after the relevant time—insuperable difficulties of proof would arise. This does not dispose of the case, however, for the question remains as to whether or not, upon the facts of this case, the company ought to be treated as having intended to keep the charges alive for its own benefit. It is not, I think, entirely clear from the opinions of the majority in the *Kensington* case (3) whether they considered that, in the case of a charge of this character, some manifestation of intention on the part of the tenant for life was required : per LORD CAMPBELL, L.C., at p. 574, and per LORD CHELMSFORD, at pp. 595, 596. It was not necessary for them to decide this question, since there was, in their view, upon the facts of the case, a clear manifestation of intention to the contrary. Whichever be the true view, it is, I think, clear that, in their opinion, a very slight indication of intention to benefit the estate would be sufficient to deprive the tenant for life of the right to claim that the charge was kept alive. LORD CAMPBELL, L.C. (at p. 574), and LORD CHELMSFORD (at p. 596) point out the special benefit which a tenant for life obtains in keeping undisturbed possession. It is, moreover, to be remembered that, in view of the obligation which lies upon the tenant for life, in the case of a continuing charge on income, to apply future surpluses in making good to capital what has been taken from it, the tenant for life may well prefer to rely on the possibility of such future surpluses, rather than on an immediate charge on corpus.

In the present case, the deficiencies occurred in the three years ending Mar. 31, 1933, 1934, and 1935, respectively. So far as the evidence before us goes, the first indication of any intention to keep the charges alive is to be found in the issue of the originating summons on May 25, 1936. The reason which induced the plaintiff company to make up the deficiencies is stated in para. 24 of the affidavit of Mr. Frere sworn in support of the summons as follows :

> Such payment was made in order to prevent the enforcement of the deficiency of the said annuity and interest against the estates to the income of which the plaintiff company is entitled.

This statement of the company's objects recalls the words of LORD CAMPBELL, L.C., in the *Kensington* case (3). I find in it, and in the fact that payments were made for three years without any intimation of any kind of an intention to claim a charge on capital, compelling reasons for inferring that the company, when it made the payments, did so to protect its position as life tenant against recourse to capital by the chargees, and without any thought or intention to keep the charges alive in its favour. The idea that such a claim could be made appears to me, upon the facts, to be an afterthought, and, assuming, without deciding, that, even in regard to charges of this character, a presumption of intention arises from the mere fact of payment, I am of opinion that, upon the facts of this case, that presumption is rebutted.

In the result, the appeal must be dismissed with costs.

MACKINNON, L.J. (read by CLAUSON, L.J.) : I have come to the conclusion that this appeal must be dismissed with costs. I have had the advantage of reading the judgment which has just been read by

Sir Wilfrid Greene, M.R., and that which is about to be read by Clauson, L.J. It will be apparent that, in the process of reasoning by which each arrives at the same conclusion as I do, they differ upon one point. Since we all reach the same result, I can pretend to no regret that it is unnecessary for me to indicate my opinion upon this point of difference between them.

Clauson, L.J.: I agree with the view expressed by Sir Wilfrid Greene, M.R., that, upon the facts of this case, the company cannot be treated as having intended to keep the charges alive for its own benefit, and the result must be that the dismissal by the judge of the summons which was before him must stand, and that this appeal must be dismissed with costs. I should prefer to leave untouched the question, which, in the circumstances of the case, has not yet arisen, as to whether, if the company in the future, on making a payment towards the jointure, or towards interest on the portions in excess of the figure of net income in its hands, sufficiently manifests an intention to keep alive a charge for the excess, it will have the right to have such a charge declared as a charge on the corpus, and be in a position immediately to enforce the charge, or transfer it to a third party. As, however, Sir Wilfrid Greene, M.R., differing from the views expressed by Farwell, J., has expressed a clear opinion upon this question, it is but right that I should state shortly why I feel a difficulty, as at present advised, in committing myself to the same opinion.

It is, of course, clear that a tenant for life of a property subject to a mortgage who pays off the mortgage is entitled to keep the mortgage alive against the corpus of the estate. The mortgagee, if the mortgage had not been paid off, would be entitled to enforce the mortgage, and thus to obtain payment out of the corpus of the estate, not only of the capital sum charged, but also of interest accruing upon the capital sum down to payment off. I am not aware, however, that it has ever been suggested that the tenant for life, paying interest to the mortgagee without repaying the capital, is entitled to keep alive the mortgagee's charge for that interest, in the sense of treating that charge as an independent charge on corpus, which he can assign to a third party, so as to give that third party a right to enforce the charge. Would such a charge carry interest? If so, the effect would be that the estate would be charged with interest upon interest, which would seem to be an anomalous result. If the charge does not carry interest, there would seem to be a capital charge created which does not carry interest; again an anomalous result. It occurs to me that the answer may be that a tenant for life is not entitled to "keep alive" an income charge, in the sense suggested by Sir Wilfrid Greene, M.R. It seems to me not impossible that the proper terms in which to formulate the rights as between tenant for life and remainderman may be as follows. An equity arises (or, according to circumstances, may arise) in favour of the tenant for life to have recouped to him out of capital the amount by which he is found to be out-of-pocket (by reason of having kept down the income charges) when the period ends during which he is in receipt of the rents and profits out of which the income charge ought to be borne. If a tenant for life finds that the rents and profits are short of the sum required to meet income charges, he may leave the chargees to enforce their rights, or he may himself apply to the court for a sale, exercising what (as appears from Tudor's Leading Cases on Real Property, 4th Edn., p. 143) is the general right of parties entitled to real estate given to one for life with remainder over if the income charges exhaust the rents and profits—namely, the right to have the estate discharged by sale of the real estate: see *Cooke* v. *Cholmondeley* (4). Under modern conditions, the tenant for life would, in most cases, be able to proceed to a sale without invoking the assistance of the court. It is also open to the tenant for life to supply the deficiency out of his own pocket, and to look to his equitable right to recoupment out of capital, should it turn out that the future rents and profits accruing to the date when his receipt of them stops, whether by reason of a sale of the land or by reason of the termination of his life interest, leave him ultimately out-of-pocket. I know, however, of no practice under which, and I hesitate to commit myself to the recognition of any principle upon which, he is entitled to have an immediate charge on the estate declared in his favour for a sum, provided to meet an income charge, in respect of which he is temporarily out-of-pocket by reason of his own deliberate act, but which may, in the event, be recouped to him in due course out of future rents and profits. As, however, the point on which I hesitate to agree with Sir Wilfrid Greene, M.R., does not at present arise, I think it better not to express a concluded opinion upon it.

Solicitors: *Frere, Cholmeley & Co.* (for the appellants, the plaintiff company, the Earl of Warwick, and the trustees of the will); *Tarry, Sherlock & King* (for all the respondents except the Earl of Warwick and the trustees of the will other than Lady Warwick).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

FRINTON AND WALTON URBAN DISTRICT COUNCIL *v.* WALTON AND DISTRICT SAND AND MINERAL CO., LTD., AND ANOTHER.

[CHANCERY DIVISION (Morton, J.), **January 12, 1938.**]

Practice—Right of audience—High Court of Justice—Defendant a limited company—Right of managing director to appear in court on behalf of the company—R.S.C., Ord. 4, *r.* 2.

A limited company cannot be represented in court by its managing director.

[**EDITORIAL NOTE.** It has always been assumed that a corporate body cannot appear in person in the High Court, but the point seems never to have been decided before.

AS TO RIGHT OF AUDIENCE IN THE SUPREME COURT OF JUDICATURE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 492-495, paras. 666-668; and FOR CASES, see DIGEST, Vol. 3, p. 319, Nos. 46-55.]

Cases referred to:

(1) *Re London County Council & London Tramways Co.* (1897), 13 T.L.R. 254; 9 Digest 677, *4511.*

(2) *Scriven* v. *Jescott (Leeds), Ltd.* (1908), 53 Sol. Jo. 101; 9 Digest 677, *4512.*

ACTION against the defendant company and the second defendant, its managing director, for a declaration regarding the removal of sand from the foreshore within the urban district and for an injunction restraining such removal.

W. P. Spens, K.C., and *Lionel Edwards* for the plaintiff council.

The defendant company was not represented by counsel, and the managing director appeared in person.

Spens, K.C.: The managing director cannot appear on behalf of the defendant company.

MORTON, J.: Is there any authority for the proposition that a company cannot appear in person?

Spens, K.C.: A company or corporate body can only sue by a solicitor: ANNUAL PRACTICE, 1938, p. 30, *Re London County Council and London Tramways Co.* (1), and *Scriven* v. *Jescott (Leeds), Ltd.* (2). Those cases note the rule. It is the practice of the Central Office to refuse to allow service of a writ by an officer of a company. There is no express authority that a company cannot be represented in court by its managing director.

MORTON, J.: The language of R.S.C., Ord. 4, r. 2, does not contemplate that a company can sue in person and the points to which my attention has been drawn are sufficient to satisfy me that a company cannot appear in person.

Solicitor: *Stanley Nicholson* (for the plaintiff council).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

HERBERT *v.* RAILWAY PASSENGERS ASSURANCE CO.

[King's Bench Division (Porter, J.), **February 16, 1938.**]

Insurance—Motor insurance—Action against insurance company to satisfy judgment against insured—Notice of proceedings—Sufficiency of—Casual conversation with agent—Road Traffic Act, 1934 (*c.* 50), *s.* 10.

W. was insured with the defendant company against third party risks in respect of a side-car, and the policy provided that the defendant company should not be liable in respect of any accident incurred while any motor cycle was being driven by or was for the purpose of being driven by him in the charge of any person other than the insured. W., while driving with a friend, fell ill, and allowed the friend to drive the side-car. While being so driven the side-car collided with a lorry, with the result that the plaintiff was injured. In an action against W., the plaintiff recovered damages and now sought to recover them from the insurance company. W., in a friendly and casual conversation with an agent of the insurance company, had mentioned that an action had been brought against him :—

Held : (i) upon the construction of the policy the exception applied and W. would not have been able to recover thereunder, and, therefore, the plaintiff could not recover in this action under the Road Traffic Act, 1934, s. 10.

(ii) notice to an insurance company of proceedings against the insured must be something more formal than a casual mention of the proceedings in a conversation. There must be something which indicates that notice is being given.

Semble : such notice can be given to an agent of the insurance company.

[**EDITORIAL NOTE.** The inference from this decision would appear to be that, in order to be safe, it will be wise to give a written notice to the insurance company of the proceedings which are being taken against the insured.

As to Conditions of Duty of Insurers to Satisfy Judgments, see HALSBURY, Hailsham Edn., Vol. 18, pp. 564, 565, para. 914 ; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217ee, 3217ff.]

Action against an insurance company claiming satisfaction of a judgment obtained against the insured in respect of personal injuries.

A. W. Elkin for the plaintiff.

Montague L. Berryman for the defendants.

Porter, J. : This is a case in which one feels considerable sympathy for the plaintiff, and Mr. Elkin has said everything that could be said on her behalf. Nevertheless, I am afraid that the law is too strong to give effect to his contentions.

The claim arises in this way. A Mr. Wilkinson had insured his motor cycle combination with the defendant company through Mr. Ackery, the secretary of Messrs. Willings, who were the employers of both himself and Mr. Wilkinson. Mr. Wilkinson was minded to get a side-car with his motor cycle at the time when he entered the employment of Messrs. Willings, and he made inquiries as to what they would do by way of supplying petrol and other things if he used it upon the business of the company. They stated with regard to that what they were prepared to do, and thereupon, quite naturally, Mr. Wilkinson determined to insure his motor cycle and side-car through Mr. Ackery, who was the agent to place the business of the Railway Passengers Assurance Company, and therefore, when Mr. Wilkinson approached him, he put forward the proposition to that company. For the purposes of getting the insurance, it was necessary, as it always is in this class of insurance, that a certain proposal form should be filled in, and that certain questions should be answered. The important questions for this purpose were the questions:

> Will the cycle be driven (*a*) Solely by you ?—Yes. (*b*) Solely by you and/or your employees ?—By me . . . (*e*) By any other person ? If so state particulars—No.

I will come back to the contention with regard to that a little later, but, continuing the story, that proposal, after a certain discussion about minor matters, then led to a policy, which I have before me, insuring Mr. Wilkinson's motor cycle. As is common in policies of this kind, it recited that:

> Whereas the insured described in the schedule hereto . . . by a proposal and declaration which shall be the basis of this contract and is deemed to be incorporated herein . . .

That is the incorporation of the proposal form. Then it insures Mr. Wilkinson against various liabilities (for the purpose of this case, one need mention only the third party liability) subject to certain general exceptions. The general exception of importance in this case is that:

> the company shall not be liable in respect of any accident incurred while any motor cycle is being driven by or is for the purpose of being driven by him in the charge of any person other than the insured.

What happened actually in the present case was this. Mr. Wilkinson who was driving with a friend, a Mr. Perkins, to a football match, had a very severe cold, and was feeling unwell while driving his cycle, and therefore, quite naturally, but forgetting the position in regard to his policy, allowed Mr. Perkins to drive the vehicle. Mr. Perkins having taken the driving seat, unfortunately they had an accident with a lorry. The accident was disastrous for both Mr. Wilkinson and Mr. Perkins themselves, who were severely hurt, but it was still more disastrous to the present plaintiff, her mother being killed, and she being injured. When, after the accident, a claim was made by the present plaintiff upon Mr. Wilkinson, Mr. Wilkinson referred the matter to the assurance company, but the assurance company promptly repudiated liability, saying that the insured was only covered while the cycle was being driven by him himself, and by no one else, and that the driving by Mr. Perkins was his risk, and not theirs. In the action brought by the present plaintiff she succeeded against Mr. Wilkinson, and the total amount, with the costs of the whole matter, is now over £700. The costs were increased because the present plaintiff brought an action against both the motor lorry and the motor cycle, and succeeded against the motor cycle, but failed against the motor lorry, with the result that what is known as a Bullock order was made, whereby the present plaintiff became liable to the driver of the lorry, and the driver and owners of the lorry are still entitled to recover their costs from Mr. Wilkinson, the defendant. Mr. Wilkinson is not able to pay that sum, and therefore, under the Road Traffic Act, 1934, s. 10, the plaintiff brings her action against the Railway Passengers Assurance Company, the insurers of Mr. Wilkinson. A

Two points have been taken in answer by the defendants, the first being: we covered you (Mr. Wilkinson) only while you were driving yourself; we are therefore not liable, and, not being liable to you, we are not liable to the plaintiff. Secondly, they say that, by the very terms of the section itself, no liability is incurred by an insurance company B unless they have notice of the action that is being brought by the plaintiff against their insured before or within seven days after, the commencement of the proceedings in which the judgment is given. The "commencement of proceedings" here, I think, means the issue of the writ. I have not got to determine that, and I must not be taken as C determining it.

First of all, with regard to the question as to whether the company are protected because they only insured Mr. Wilkinson, their assured, while he was driving himself, I think that they have made a general exception which in sufficiently clear terms indicates that they will cover D their assured only if he is driving himself. So far as his knowledge is concerned, if that is material, or so far as the proposal form is concerned, if that is material, that plainly indicates that he only intends to drive it himself. That, of course, even with the incorporation of the proposal form, would not be fatal, unless the exception says that the company E do not cover him except when he is driving himself. When I say that, I do not say that as necessarily applying to all cases. In motor-traffic cases, one has to consider the provisions of the Act. In this case, taking the wording of the policy alone, and nothing else, I do not think that one can fairly construe it as meaning anything other than that the F insurer shall not be liable while the motor is being driven by any person other than the insured, or is, for the purpose of being driven by him, in the charge of any person other than the insured.

Mr. Elkin suggests, and has put before me with force and ingenuity, the suggestion that one might read it as if the words "driven by," as G well as the words "or is for the purpose of being driven by," were qualified by, and formed part of, the phrase which continues: "in the charge of any person other than the insured." Let me make a little plainer what I mean by that. What is meant by that, as Mr. Elkin says, is that, instead of reading the sub-cl. (*b*): H

> The company shall not be liable while the vehicle is being driven by any person other than the insured or is for the purpose of being driven by him in the charge of any other person

—one ought to read it:

> is being driven by any person other than the insured in the charge of any person

> other than the insured or is for the purpose of being driven by him in the charge of any person other than the insured.

If that is true, leaving out immaterial words, one would have to read it in this way:—

> The insurer shall not be liable while the motor is both being driven by any person other than the insured and in the charge of any other person than the insured.

That does not seem to me anything which is either required or which could be said to meet any object, or to be the natural reading of the words. In my view, neither is that a construction which would be a natural construction of the words, nor am I able to accept that as being the true construction of the policy. I did raise the question, and Mr. Elkin raised it before me, as to whether there might not be a claim under sect. 36 (1) (*b*), in that the wording of that section was so wide that it included any case where the assured was liable owing to the use of any motor on the road, and in that sect. 10 of the Act of 1934 imposed a liability upon the insurers where the assured was liable and could not pay. But sect. 10 does not, I think, impose any such liability in a case where the insurers have limited their liability by the wording of the policy, but only in a case where there is an apparently valid policy covering the liability, which yet they could have avoided or cancelled because of some misrepresentation or concealment on the part of the assured.

The other question which I have to determine is the question as to whether the plaintiff in the present case is precluded by the fact that no notice was given to the assurance company, the defendants. So far as that is concerned, of course, no direct notice was given, but it is said that notice was given to the gentleman who was the agent for the assurance company for effecting the insurance, Mr. Ackery. I am not going to determine the exact position of Mr. Ackery. I am not saying anything about that position, except that insurance companies may know the attitude which perhaps one thinks they ought to take, rather than the attitude which is a legal one. Again, let me qualify it with this. In saying that, I am not giving a considered opinion. It may be that there are other grounds which may want consideration, but, if an agent is an agent to effect a policy, and conducts the negotiations for effecting the policy, and if afterwards to that person clear notice were given, I should think that an insurance company, whatever their legal liabilities, might well recognise that as being a notice, given underneath the section, that proceedings had been begun. Even if that is right, however, I think that for that purpose it must really be a notice in the sense that it is given formally as a notice. It must not be some mere piece of casual conversation. Here, I can see no reason why Mr. Ackery should regard Mr. Wilkinson's statement as a matter which he ought to pass on to the insurance company, or as a matter which he should remember at all. In the course of casual conversation, Mr. Wilkinson, who had come up to see his former companions, mentioned in a friendly, casual conversation that an action had been brought against him. To my mind, that can in no sense be regarded as being a notice as required by the Act. It must be something much more formal than that, something which would indicate to the company's agent, if agent he was for that purpose, that a notice was being given. Therefore, I think that on that head the claim fails also. I do not propose to determine now, but my general view is, that, even where a company repudiates its liability—I am merely giving this as a superficial view—their repudiation is not sufficient to acquit the person claiming from showing that notice has been given to them. Without considering the matter thoroughly, the view which I hold at present is that, where an Act of Parliament stipulates that recovery shall not take place except in certain events, those events must take place before the plaintiff can recover. This is not the ordinary case of the waiver of an obligation which they themselves had imposed. For these reasons, the plaintiff cannot in law recover in this case.

Action dismissed.

Solicitors: *De Meza & Menasse* (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

STEVENS *v.* ECONOMIC HOUSE BUILDERS, LTD.

[Court of Appeal (Greer and MacKinnon, L.JJ., and Bennett, J.), **January 28, 1938.**]

Practice—Costs—Order for new trial—Costs of appeal—Costs of trial not paid—Plaintiff insolvent—Order for stay of costs of appeal until after second trial.

The plaintiff brought an action for damages for personal injuries caused by negligence or breach of statutory duty. At the close of the plaintiff's case, the judge ruled that there was not sufficient evidence of negligence to go to the jury, and he directed the jury to find a verdict for the defendants. On appeal, it was held that there was evidence of negligence sufficient to go to the jury, and that it could not be said that there was conclusive evidence of contributory negligence on the plaintiff's part. A new trial was therefore ordered. The costs of the first trial not having been paid by the plaintiff, a bankruptcy notice had been served on him in respect of those costs:—

Held: there must be a stay of the order for the costs of the appeal until after the new trial. Should the defendants be successful again, the costs of the trial would be set off against the costs of the appeal.

[**EDITORIAL NOTE.** The court has here granted a stay of payment of costs by a solvent party to an insolvent party in a case where in further proceedings there may be costs due to the solvent party by the insolvent, thus affording an opportunity of set-off.

As to Costs When New Trial Ordered, see HALSBURY, Hailsham Edn., Vol. 26, p. 128, para. 251; and for Cases, see DIGEST, Practice, p. 790, Nos. 3531, 3532. See also YEARLY SUPREME COURT PRACTICE, 1938, p. 1267.

Case referred to:

(1) *Baker* v. *Longhurst* (*E.*) *& Sons, Ltd.*, [1933] 2 K.B. 461; Digest Supp.; 102 L.J.K.B. 573; 149 L.T. 264.

APPEAL from a decision of MACNAGHTEN, J., sitting with a common jury, dated Apr. 13, 1937. This case is reported only on the question of the staying of the costs of an appeal until the second trial has been determined.

A. S. Comyns Carr, K.C., and *Alban Gordon* for the appellant.

G. Russell Vick, K.C., and *N. Faulks* for the respondents.

The following extract from the judgment of GREER, L.J., shows the position arising on this appeal.

GREER, L.J.: This is an unfortunate case, because it is a case in which the only remedy that this court can give to the plaintiff is a remedy by new trial. The judge thought, and I think that he wrongly thought, that there was no evidence of negligence on the part of the defendants, that there was no evidence of negligence on the part of the defendants sufficient in common law to go to the jury, and I think—at any rate, though he did not express it in his formal judgment, he did express it in the course of the argument—that he thought that there was conclusive evidence of contributory negligence on the part of the plaintiff himself. That is the point mainly relied on, I think, by the argument for the defendants. In my judgment, if one looks at the evidence of the plaintiff, however thin one may consider it, and however much it might be expected that upon a proper direction the jury might have found in favour of the defendants, there was some evidence which the judge was not justified in withholding from the jury.

Russell Vick, K.C.: With regard to the costs of the appeal, these circumstances have arisen which might affect your Lordships' decision upon it. The defendants were successful in the court below, and had an order for taxation of costs. The defendants could, of course, have come to your Lordships' court and asked for security for costs with regard to the appeal. Whether or not your Lordships would have granted any sum, and, if so, what sum, must, of course, be a matter we shall never know.

GREER, L.J.: The mere fact that he has not paid the costs is not sufficient. You must be able to show that he could not pay the costs of the appeal, a very much lower figure.

Russell Vick, K.C.: I am going to ask your Lordship to say that any sum with regard to the costs of the appeal should be paid over to the solicitors for the successful appellant, with an undertaking that, if the defendants are successful in the new trial, there shall be a set-off with regard to the costs, which, if the defendants are successful, they will get on the new trial. It seems to me to be fair.

GREER, L.J.: You are asking, in effect, for a stay of the order as to costs until after the new trial.

Russell Vick, K.C.: No, my Lord, I did not intend to ask for that. What I am asking for is that the money should be paid over to the plaintiff's solicitors, but that, if the defendants are successful upon the new trial, and, of course, succeed with an order for costs, then those costs should be taxed, and, if there is a balance or difference of costs, the plaintiff's solicitors should refund it. We have served a bankruptcy notice upon him with regard to the costs of the first trial, and it has not been complied with.

Greer, L.J.: It would satisfy you if there is a stay of our order as to costs until after the hearing of the new trial?

Russell Vick, K.C.: Yes, my Lord.

Comyns Carr, K.C.: That, in my submission, would be a most unusual order to make. Hundreds of cases in exactly similar circumstances have occurred, where an impoverished plaintiff has brought his action and then had to appeal and a new trial has been ordered. I do not know whether it has ever been suggested, but it has never, so far as I know, been ordered that the costs awarded to him on the appeal, which he was bound to bring in order to re-establish his case on its feet, should be subject to a stay.

Greer, L.J.: If he were somebody they could hope to get their costs out of on the new trial, I would not think of making such an order. It is somebody out of whom they cannot possibly get their costs. Will your client, if the costs are paid, do what is suggested—namely, keep them in hand until the hearing of the new trial, and undertake to be responsible for a set-off of costs?

Comyns Carr, K.C.: He might be prepared to do so. If your Lordship so directed him, I have no doubt that he would. In my submission, however, that would be an equally unheard-of order.

Greer, L.J.: I am inclined to think that a stay will be a very much better order in this case. We are here, amongst other things, to make precedents. We think that there ought to be a stay of the order for costs until after the hearing of the new trial, in order that there may be an opportunity between these parties of a set-off, in the event of the defendants succeeding, of the costs which they will then be entitled to get, against the costs which they will have to pay. It is the first time that the order has been made. Probably those who are in charge of the practice books will take a note of it.

Appeal allowed with costs. New trial ordered. Order made for the stay of the costs of the appeal until after the second trial.

Solicitors: *Musson & Co.* (for the appellant); *Hanchett Copley & Hails*, Edgware (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

TYSER *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Simonds, J.), **February 10, 23, 1938.]**

Estate Duty—Exemption—Pictures and objects of artistic interest—Sale—"Proceeds of sale"—Finance Act, 1930 (*c.* 28), *s.* 40.

The Finance Act, 1930, s. 40, exempts objects of national, scientific, historic or artistic interest from death duties so long as they are enjoyed in kind. If they are sold, the death duties then become chargeable on the proceeds of sale. The question for decision was whether the duties were chargeable on the gross or net proceeds of sale :—

HELD : the duty in such cases was chargeable on the net proceeds of sale, *i.e.*, after the deduction of the expenses of sale.

[EDITORIAL NOTE. It is here said that the expenses of sale, which in the case of the sale of objects of artistic interest are largely the commission paid to the auctioneers selling, are not a taxable subject, and that the tax must be levied on the fruits of the sale to the person to be taxed.

AS TO DEATH DUTIES ON PICTURES AND OBJECTS OF ARTISTIC INTEREST, see HALSBURY, Hailsham Edn., Vol. 13, p. 262, para. 264 ; and FOR CASES, see DIGEST, Vol. 21, pp. 24, 25, Nos. 133-137.]

ADJOURNED SUMMONS by which the plaintiffs, the executors and trustees of Henry Oppenheimer, who died on Mar. 23, 1932, asked for the determination by the court of the following question : Whether on the true construction of the Finance Act, 1930, s. 40 (2), the death duties which became payable on the sale of the objects to which such section applies, which formed part of the estate of the above-named testator became payable on (*a*) the net proceeds of sale of such objects after deduction of the costs and expenses of the sale, including commission, as claimed by the plaintiff, or (*b*) the gross proceeds of sale, as claimed by the defendant.

The facts of the case are set out in the judgment.

Wilfrid M. Hunt for the plaintiff.

J. H. Stamp for the defendant.

Hunt : The question turns upon the meaning of the words "proceeds of sale" in the Finance Act, 1930, s. 40 (2). The same words occur in the Finance Act, 1894, s. 22 (1) (*f*), where it is obvious that net proceeds of sale are meant. In the Finance Act, 1912, s. 9, it is provided that timber shall bear estate duty when it is felled, after deducting all necessary outgoings. The expression "proceeds of sale" in the Act of 1894 must have meant net proceeds. There is a marked difference between the price which an article will fetch and the proceeds of sale. The price is what the purchaser pays, but the proceeds of sale received by the vendor are something quite different. It would seem strange if a vendor should have to pay all the expenses necessary to getting a good price, and then have to pay estate duty on the selling price. It is in the interest of the Crown that these expenses should be incurred. If the words of the Act are capable of two interpretations, that which is in favour of the subject should be taken.

Stamp : The words "proceeds of sale" mean the whole of the proceeds, no matter into whose pocket they go. If the duty is assessed at the date of death, it is assessed on the price which the property would fetch if it were sold in the open market. In that case, there are no actual proceeds of sale. If the property were sold, the vendor would have to incur the expenses of the sale in order to get the price. In the Finance Act, 1910, s. 61 (4), which deals with timber, the words are "net moneys." The reason is, presumably, that the growing of timber is a kind of business, and what one looks at is the profit to the landowner. His profit is the net profit, and so he is allowed to deduct the necessary outgoings since the previous death. Another context in which the result of sale is dealt with is where land or other property is sold under an order of the court. It is always the total amount which is paid in. The form of the order reads "money to arise from the sale." Where pictures are offered for sale by an owner, there might be an abortive auction, or the pictures might be sold at a high price later without reference to the auction, in the holding of which much expense might have been incurred.

Simonds, J.: This case raises a novel point as to the estate duty payable on the sale of chattels for which, upon the death of their former owner, exemption from death duties was successfully claimed upon the ground of their national, scientific, historic, or artistic interest.

The facts are as follows. Henry Oppenheimer died on Mar. 23, 1932, possessed of a very valuable collection of drawings, ivories, statuary and other works of art of every description. By his will, which was made on Feb. 4, 1931, he authorised his trustees in their absolute discretion to lend his collection or any part of it to his wife, or any exhibitions, museums, or similar institutions, and, subject thereto, directed that it should fall into and form part of his residuary estate. Upon his death, exemption from death duties in respect of the collection was successfully claimed under the Finance Act, 1930, s. 40. The testator's widow survived him, and died on Mar. 12, 1936. Until her death, the trustees exercised the authority to which I have referred, and during this period the collection was accordingly enjoyed in kind. Upon her death, however, it became necessary to sell it. The trustees took the most expert advice they could get as to the best method of sale, and sold the whole collection, with a few small exceptions. What are described as the gross proceeds of sale amounted to £140,475 18*s*., and what are described as the expenses in connection with the sale amounted to £13,182 16*s*. 6*d*. It is alleged without contradiction, and I believe, that it was necessary to incur such expenses in order to sell the collection to the best advantage. By far the largest item is the commission of 7½ per cent. on the gross proceeds of sale paid to the auctioneers, which amounted to over £10,000. In these circumstances, the Attorney-General claims that estate duty is now payable upon £140,475 18*s*., while the trustees claim that it is payable upon that sum less £13,182 16*s*. 6*d*. The duty payable being at the high rate of 24 per cent., a sum of no less than £3,144 is at stake.

Before I further consider the Finance Act, 1930, s. 40, the correct interpretation of which is immediately under discussion, I must look back to the earlier legislation. The Finance Act, 1894, s. 7 (5), provides that the principal value of any property (i.e., of any property passing on the death in respect of which duty is exigible) shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased. This provision applies to works of art as to other kinds of property. A limited exemption is given by sect. 15 (2) of the same Act, which provides that it shall be lawful for the Treasury to remit the duty in respect of any such pictures, etc., as appear to the Treasury to be of national, scientific or historic interest, and to be given for national purposes or to any university or otherwise as therein mentioned.

A wide exemption is given by the Finance Act, 1896, s. 20, which is the forerunner of the section I have to interpret. That section provides, by sub-sect. (1):

> Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, and is settled so as to be enjoyed in kind in succession by different persons, such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind by a person not competent to dispose of the same, be exempt from estate duty, but if it is sold or is in the possession of some person who is then competent to dispose of the same, shall become liable to estate duty.

By sub-sect. (2) it is provided:

> The person selling the same, or for whose benefit the same is sold, and also the person being in possession and competent to dispose of the same, shall be accountable for the duty, and shall deliver an account, in accordance with sect. 8 of the principal Act [within the time specified].

Upon a reference back to sect. 8 of the principal Act, I find nothing which helps me to a solution of the present question. It is to be observed that the words "proceeds of sale" do not occur in sect. 20 of the 1896 Act. Still further exemption was given by the Finance (1909-1910) Act, 1910, s. 96, by which it was in effect provided that absolute owners should be placed in the same position as that of limited owners, so that in any case duty was exigible only upon a sale. So the law remained until 1930. The position, therefore, was that from 1894 to 1896 duty was payable upon the hypothetical market price of the chattels, unless exemption was conceded, while from 1896 to 1910 the same provision applied except where the chattels were settled so as to be enjoyed in kind in succession by different persons, but in such cases it was only upon a limited owner effecting a sale or a person becoming entitled in possession and competent to dispose that an account had to be delivered. It is somewhat obscure, and fortunately I have not to decide what form the account should have taken. It may well be that the value of the chattel, even where it was sold, was still, for the purpose of duty, taken to be the hypothetical market price at the date of the death of the deceased. No other test of value appears to be provided. Then from 1910 to 1930, whether or not chattels were settled, if they satisfied the Treasury test, duty was payable only upon a sale. Upon that event, an account had to be delivered, and still, so far as I have been able to ascertain, no test other than the hypothetical market price was provided.

In this state of the law the Finance Act, 1930, was passed. Sect. 40 of that Act provided :

> (1) Where there pass on the death of a person dying after the commencement of this Act any objects to which this section applies, the value of those objects shall not be taken into account for the purpose of estimating the principal value of the estate passing on the death or the rate at which estate duty is chargeable thereon, and those objects shall, while enjoyed in kind, be exempt from death duties. (2) In the event of the sale of any objects to which this section applies, death duties shall, subject as hereinafter provided, become chargeable on the proceeds of sale in respect of the last death on which the objects passed and, as respects estate duty, at the rate appropriate to the principal value of the estate passing on that death upon which estate duty is leviable, and with which the objects would have been aggregated if they had not been objects to which this section applies, and the person by whom or for whose benefit the objects were sold shall be accountable for the duties and shall deliver an account for the purposes thereof within one month after the sale.

Then there is a proviso, which is not relevant to the present purpose, and then there is a definition of the objects to which the section applies, which definition covers the present case. Thus, this section for the first time introduced "proceeds of sale" as the measure of liability in the case of such chattels. The same expression is used in the Finance Act, 1894, s. 22 (1) (*f*), but the context is such that I do not derive any assistance from its use. In the Finance Act, 1912, s. 9, which deals with timber, I find an expression :

> net moneys (if any), after deducting all necessary outgoings since the death of the deceased, which may from time to time be received from the sale of timber. . .

Though the policy of the legislature in regard to duty on timber affords some slight analogy to that in regard to works of art, I do not think that I can get any assistance in the interpretation of sect. 40 of the Act of 1930 from a consideration of sect. 9 of the Act of 1912. I was referred also to the Bankruptcy Act, 1869, s. 87, where the expression "proceeds of sale" is used, and to forms of orders where the same or similar expressions are commonly used, but the result was less to elucidate the section I have to consider than to suggest that there may be other problems in other fields.

As a result of considering the earlier legislation, I am left with no more help than this, that in dealing with this subject-matter the legislature has thought fit to substitute for a hypothetical price, resting on the opinion of the commissioners, the certain test of actual sale. What, then, are "the proceeds of sale" upon which duty must be levied ? In my judgment, they are the proceeds of sale which reach the vendor or any person on his behalf and for his use after payment of the proper expenses of sale. To take what is the largest item of deduction from the gross proceeds of sale, the sum of over £10,000 paid to or retained by the auctioneers as their commission upon sale, I can see no justification for regarding this as a taxable subject. For the purpose of a taxing Act, it must, I think, be right to regard as a proper subject of taxation only that which in fact represents the value of his property to the man who is taxed. As I see the purpose and scheme of this legislation, it is to impose a tax upon property which passes on a man's death, and to determine the quantum of the tax by reference to the value of the property, i.e., the value of the property to him. If the value is ascertained by reference to a sale, it is, as it appears to me, beside the mark to ask what the value of the property would be to him upon a sale if he had the fruits of a sale but not its expenses; and it is, I think, particularly unreasonable to regard the gross proceeds of sale as the value to him of his property if those gross proceeds are only reached, as they are here, by a substantial expenditure, and is in effect to tax the subject in respect of a sum expended no less for the benefit of the Crown than for that of the subject.

It was urged upon me by counsel for the Attorney-General that the proceeds of sale and the price paid must mean one and the same thing, the difference of expression arising from the different angle of view, that of the vendor or purchaser. This cannot, in my judgment, be generally true, for it would be easy so to arrange the method of sale—for example, by placing the articles in the hands of an agent for sale, upon the terms that he should account for a portion only of the proceeds to the owner—that it would be quite impossible to identify the price paid by the purchaser with the proceeds which reach the former owner. In substance, there is no real difference between such a case and the present, where the auctioneers receive their commission for their labours. In neither case is the price paid by the purchaser the same thing as the proceeds of sale received by the vendor. I see no difficulty as a matter of construction in holding that in the Finance Act, 1930, s. 40, the expression "proceeds of sale" means the net proceeds of sale, i.e., the proceeds after deducting the expenses of that sale, and I so hold and declare accordingly.

Solicitors: *Linklaters & Paines* (for the plaintiff); *Solicitor of Inland Revenue* (for the defendant).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re COX, PUBLIC TRUSTEE *v.* EVE.

[CHANCERY DIVISION (Simonds, J.), **February 10, 11, 15, 16, 1938.**]

Wills—Gift of annuities—Power to set aside fund—Annuities charged on residue—Other specific sums given out of residue—Abatement—Rights of annuitants.

The testator by his will bequeathed a number of pecuniary legacies. The residue of his estate he charged with certain annuities, and, subject thereto, he bequeathed the same as to both capital and income to certain named persons, institutions, and corporations, giving to each a stated sum, and stating that, in case of insufficiency, they should receive sums in proportion to the amounts given. The ultimate residue, if any, was given as on an intestacy. He gave the trustees power to set aside a certain sum, out of the income of which the annuities were to be paid. In the events which happened, it was impossible to set aside a sum the income of which would be sufficient to pay the annuities, and it was not yet ascertained whether there would be sufficient to pay the annuitants the capital value of their annuities. No question arose upon the payment in full of the pecuniary legacies, and the only contest was between the annuitants and those entitled to the residue :—

HELD : (i) the annuitants were entitled to have their annuities paid in full up to the date of the order, and the annuities must be actuarially valued as at that date, and the amount of such valuation paid to them. A

(ii) annuitants who had died before the date of the order were entitled only to the arrears of their annuities.

[EDITORIAL NOTE. In this case, the decision in *Re Cottrell* (6) has been applied. The distinction between the position here and that in *Re Cottrell* (6) is twofold. B In the first place, there was in *Re Cottrell* (6) a trust to set aside a fund for the annuities, whereas in the present case there is a mere power of appropriation of investments to meet their payment. In the second place, the gift of the annuities is here followed by gifts of specific sums to various institutions, and the ultimate residue, if any, is given as on an intestacy. In *Re Cotrell* (6), after the gift of the annuities, any further residue was given absolutely to a beneficiary. C

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 24, Rentcharges. pp. 480, 481, para. 937 ; and FOR CASES, see DIGEST, Vol. 39, pp. 124-129, Nos. 182-217.]

Cases referred to :

(1) *Long* v. *Hughes* (1831), 1 De G. & Sm. 364 ; 23 Digest 420, *4919* ; 7 L.J.O.S.Ch. 105. D

(2) *Wright* v. *Callender* (1852), 2 De G. M. & G. 652 ; 23 Digest 421, *4922* ; 21 L.J.Ch. 787 ; 19 L.T.O.S. 308.

(3) *Todd* v. *Bielby* (1859), 27 Beav. 353 ; 23 Digest 421, *4925*.

(4) *Re Wilkins, Wilkins* v. *Rotherham* (1884), 27 Ch.D. 703 ; 39 Digest 161, *527* ; 54 L.J.Ch. 188.

(5) *Heath* v. *Nugent* (1860), 29 Beav. 226 ; 39 Digest 161, *528*. E

(6) *Re Cottrell, Buckland* v. *Bedingfield*, [1910] 1 Ch. 402 ; 23 Digest 421, *4924* ; 79 L.J.Ch. 189 ; 102 L.T. 157.

(7) *Re Grant, Walker* v. *Martineau* (1883), 52 L.J.Ch. 552 ; 39 Digest 173, *633* ; 48 L.T. 937.

(8) *Re Dempster, Borthwick* v. *Lovell*, [1915] 1 Ch. 795 ; 23 Digest 420, *4918* ; 84 L.J.Ch. 597 ; 112 L.T. 1124. F

(9) *Re Ellis, Nettleton* v. *Crimmins*, [1935] Ch. 193 ; Digest Supp. ; 104 L.J.Ch. 53 ; 152 L.T. 370.

(10) *Carr* v. *Ingleby* (1831), 1 De G. & Sm. 362 ; 23 Digest 420, *4913*.

(11) *Re Ross, Ashton* v. *Ross*, [1900] 1 Ch. 162 ; 23 Digest 421, *4923* ; 69 L.J.Ch. 192 ; 81 L.T. 578.

G

ADJOURNED SUMMONS by the Public Trustee, one of the executors and trustees of the will and codicil of William Foster Cox, dated Feb. 28, 1930, and May 25, 1935, respectively, for the determination, *inter alia*, of the following question : how the residuary estate of the testator ought to be apportioned in respect of and as between certain annuities H and the legacies bequeathed out of the residuary estate to certain named persons, institutions and corporations.

H. Rose for the plaintiff.

L. W. Byrne for the first defendant, an executor and trustee and a pecuniary legatee.

S. M. Krusin for the second and third defendants, each of whom is the tenant for life of a certain messuage and entitled to the benefit of a direction for payment of outgoings in respect thereof.

E. M. Winterbotham, *H. Hart*, *F. C. Watmough*, and *W. G. Hart* for other defendants who were annuitants.

A *M. G. Hewins*, *J. H. Boraston*, *J. T. Edgerley*, *Humphrey H. King*, and *F. E. Skone James* for other defendants interested in residue.

A. Andrewes Uthwatt for the Attorney-General.

Rose: Stated the facts.

Winterbotham: Down to *Re Cottrell* (6), no one would have disputed
B that, where there was not sufficient to pay the legacies and the actuarial value of the annuities, the annuities would have to be valued. It was laid down by WARRINGTON, J., in *Re Cottrell* (6), that that was to be done where the estate was not actuarially insufficient. Where an annuitant has died and his annuity has not been paid, there is a dispute
C between annuitant and legatee, because an annuitant who has died and has not been paid becomes a legatee. It is just as important, however, to do justice to annuitants who are not legatees as to those who are. [Counsel also referred to *Carr* v. *Ingleby* (10), *Re Grant, Walker* v. *Martineau* (7), *Re Ross, Ashton* v. *Ross* (11), *Re Dempster, Borthwick*
D v. *Lovell* (8), *Long* v. *Hughes* (1), *Re Ellis, Nettleton* v. *Crimmins* (9).]

Watmough: There are a number of annuities of different amounts given to different people. It would be unfair to the younger annuitants to allow the annuitants to take the income and capital so long as it exists, because the result of that would be that the older annuitants
E would be paid in full and the younger ones would not. It is therefore necessary to make some valuation between the annuitants, in order to produce equality. One method is by making an actuarial valuation and purchasing annuities. The other way would be to value the annuities and provide sums accordingly. The only alternative to an actuarial valuation
F would be to take the whole estate and divide it in proportionate parts, according to the value of the annuities. The legatees are entitled to be paid immediately if there is anything out of which they can be paid.

King: In every case which has been cited, either the estate was insufficient to purchase the annuities or there was a trust to set aside a fund.
G In *Re Cottrell* (6), there was a trust to set aside a fund. In such cases, one cannot do what the testator directed, unless there is sufficient to set aside that fund. In the present case, there is merely a power to appropriate, and there has not been a case where there was merely a power of appropriation and capitalisation has been resorted to because the
H estate was insufficient to provide the fund. If people ask the court to upset the testator's will because they think that they are going to be treated unjustly, they must prove that that will be so. An estate is never insufficient if, after paying all that has priority, there is sufficient left to pay the annuitants. In the present case, there is no direction to set aside such a sum as will produce the annuities, and

therefore the annuitants are not entitled to say that the estate is insufficient. [Counsel also referred to *Re Grant, Walker* v. *Martineau* (7).]

Edgerley: In *Re Grant* (7), the annuitants had not priority. The annuitants could have no right to anything but the payment of their annuities according to the terms of the will if the inquiry which was directed was answered in the affirmative. The inquiry was as to whether the estate was sufficient to procure the annuities. If an estate is sufficient to procure the annuities, the annuitants must be content to have the annuities paid to them year by year, in order that there may be some chance of the residuary legatees getting something.

Simonds, J.: William Foster Cox made his will on Feb. 28, 1930. He made a certain codicil thereto on May 25, 1935, and he died on Dec. 30, 1935. Probate of the will and codicil was granted on Mar. 30, 1936, to John Eve, and also to the Public Trustee, who is the trustee plaintiff in these proceedings. By his will, after appointing executors and trustees, and after giving a legacy to John Eve, the testator bequeathed to the persons named in the second schedule of his will the respective sums set out against their names. These were pecuniary legacies. He then made certain bequests which, for the purpose of the second question, I need not read. He then made a residuary devise and bequest of all his real and personal estate to his trustees for sale and conversion, with the ordinary powers, and he directed his trustees, with the money raised, to pay the legacies given by his will or by any codicil thereto, and the duties on all legacies and annuities given free of duty, and he directed that, subject thereto, his trustees should stand possessed of the proceeds to pay the persons mentioned in the first and second columns of the third schedule the respective bequests mentioned in the fourth column thereto. Also, he directed that, with regard to the annuities, certain provisions should take effect, and in particular that the trustees might set apart in their names, or under their control, a certain sum, the income of which might be sufficient to pay the annuities, and he gave certain directions with regard to appropriation, to which I need not refer. He gave another direction with regard to a builder named Fenn, and he directed that all legacies and the annuities should be paid and enjoyed free of duties payable at his death. After certain other directions, he declared that, as to all the residue of his estate, subject to all the trusts declared, he bequeathed the same both as to capital and income to the persons, institutions and corporations mentioned in the fourth schedule, and the amount should be apportioned in the amount set out in the third column of that schedule. He further provided that, if there should be any sum of the residuary estate remaining undisposed of after all the residuary legatees had been paid in full, that was to be given to the persons who would be entitled thereto under the Administration of Estates Act, 1925. He then gave this further direction and authority. He directed his trustees not to wait until the whole of the annuities had fallen in before making payment of the legacies bequeathed out of his residuary estate, but, as soon as £5,000 had accumulated, to pay to each residuary legatee, or to his legal personal representative, as the case might be, one fourth part of the amount bequeathed by his will. There are two particular things to notice. The pecuniary legacies have priority over the annuities, so that there is no competition between the pecuniary legatees and the annuitants. Pecuniary legacies may include annuities in certain circumstances, but in this will I distinguish the two. As a matter of construction of this will, the annuitants are to be paid before there is any residue out of which the sums mentioned in the fourth schedule are to be paid. The only facts I need mention are these. The estate, which consists to a considerable extent of real estate, the value of which is a matter of speculation, is clearly insufficient after payment of the pecuniary legacies, to provide for the payment in full of the annuities given by the will. Whether the estate, when it is realised, will be sufficient to provide the actuarial value of the several annuities is a matter not yet ascertained, and, inasmuch as the estate consists to a large extent of real estate, the value can be stated only after a sale. In these circumstances, the question is one between the annuitants, on the one hand, and the residuary legatees, on the other. By residuary legatees, I mean those persons who are entitled to a share of ultimate residue in certain events, and the question is, having regard to the fact that the estate is inadequate to pay the income in full, whether the annuitants are entitled to have the estate actuarially valued and the amount of such income made up. As between pecuniary legatees and annuitants, the ordinary rule of administration is, where the estate is inadequate to provide in full for them, that it is necessary to have a valuation, and the pecuniary legatees and the annuitants will have paid to them respectively the legacies and the amount of the valuation of the annuities *pari passu*. I find that, where the estate is insufficient to provide for payment in full, that rule applies, and is the rule in *Long* v. *Hughes* (1) and other cases. It is clear also that, where the contest is not between the pecuniary legatees and the annuitants, but between annuities and residue, the annuitants are not entitled to have the annuities valued and the amount of the valuation paid out. That rule is now established by the case of *Wright* v. *Callender* (2), and it has never been departed from nor qualified. The reason is this. The annuitant is entitled to have the whole of the income, and, if necessary, the corpus. The residuary legatee can get nothing until the annuitant has been paid in full. The annuitant gets his annuity until the estate is exhausted. The residuary legatee gets what is left, if anything. That is what the testator intended. The case before me is one in which the competition is not between pecuniary legatees and annuitants, but between the annuitants and those interested in the residue. The question that arises is whether, in such a case, in order to do justice, it is necessary that the annuities should be valued and the amount of the valuation paid out to the annuitants. To my mind, it is quite clear, and I think the authority is conclusive, that, at any rate where the estate is insufficient to provide the actuarial amount according to the proper valuation, the annuitants are entitled to have their annuities valued. Let me put a hypothetical case. A testator gives an annuity of £100 to A. who is aged 90, and also one to B. who is aged 19, and he leaves an estate of £1,000. If the capital is paid in satisfaction of the annuity, the annuitant aged 90 will in all probability get his annuity for the remainder of his life, while B. will be paid for a part only of his life. So justice can be done between A. and B. only by making an actuarial calculation of the value of the annuities given to them, and by then dividing the estate between them rateably. That appears to be not only consonant with a fair administration of the assets of the testator, but also supported by such cases as *Todd* v. *Bielby* (3), *Re Wilkins, Wilkins* v. *Rotherham* (4), and *Heath* v. *Nugent* (5). The argument before me turns upon this. Assume that to be so that, where the estate is actuarially insolvent—that is, insolvent in that it cannot provide the actuarial valuation of the annuities—why should that rule obtain where the estate is not actuarially insolvent, but merely insufficient to provide the annuities from income. The answer is to be found in an authority which binds me, the case of *Re Cottrell, Buckland* v. *Bedingfield* (6). The facts are admirably set out in the headnote :

> Testatrix by her will, after giving certain pecuniary legacies, bequeathed to her husband an annuity of one pound per week during his life and directed her trustees to appropriate and set apart and invest such sum of money as would when invested produce by the income thereof an annual sum equal to the amount of the annuity, which sum should on the dropping of the annuity fall into and form part of her residuary trust estate. She devised and bequeathed the residue of her real and personal estate to her trustees upon trust for sale and conversion and payment of her debts, funeral and testamentary expenses and legacies and invest the moneys which should remain in certain investments, and to hold such investments upon certain trusts for the benefit of her son.

The estate of the testatrix was insufficient to pay in full the pecuniary legacies and to set aside a sum sufficient to answer the annuity given to her husband. It was, however, sufficient to pay the pecuniary legacies and the value of the annuity as at the date of her death, and the judge decided that the proper course was for the trustees to value the annuity and to pay the amount of such valuation, or invest it in the purchase of an annuity, and to pay the pecuniary legacies in full. That is to say, the judge decided that, where the competition was between pecuniary legatees and annuitants, the test was not whether the estate was sufficient to provide payment of the legacies and payment of the actuarial value of the annuities, but whether the estate was sufficient to pay the legacies and to provide a fund sufficient to answer the annuities. That is the point I have to decide, except that in this case it is competition between annuities and residue. If that rule is to prevail, the same rule should be applied where the competition is between the annuitants *inter se*, and it would, to my mind, create unnecessary refinement and confusion if, in the administration of this estate, I were to introduce a different rule. In *Cottrell's* case (6), WARRINGTON, J., as he then was, after a careful examination of the argument which had been put forward in that case, came to the conclusion that he must adopt that rule. Attention was called to the case of *Re Grant, Walker* v. *Martineau* (7), where PEARSON, J., without any argument on the part of the annuitant, appeared to think that the test was not whether the estate was adequate to provide for the income for the annuitant, but whether, having regard to the fact that the annuitant would be at liberty to resort to the capital if necessary, the same would be sufficiently secured by the fund remaining in court after payment of the legacies in full. The judge must have assumed that, if that inquiry were answered in the affirmative, nothing more need be done with regard to payment out to the annuitant. As regards those two decisions, I must, I think, follow that of WARRINGTON, J., as he then was, in *Cottrell's* case (6), where the point was expressly raised. It has been urged before me that this case is distinguishable from such a case as *Cottrell's* (6), because in *Cottrell's* case (6) there was an express direction by the testator to his trustees to set apart a fund to provide the annuity. I cannot see what difference that makes. It appears to me that the direction which the testator gives to the trustees to set aside a fund to provide for the annuities is really a direction which enables and authorises them to distribute the estate after the fund has been so set aside. It is a direction which is intended to avert the necessity under which the trustees otherwise labour of being unable to distribute the estate without coming to the court and asking for liberty to do so. Where there is no such direction contained in the will, executors come to the court and ask if they may distribute the estate, and leave so much in their hands to enable them to satisfy the annuities, and the court authorises such a distribution with a substantial margin. The direction is not for the benefit of the annuitants, but to assist the executors in the distribution of the estate. For the purpose of considering the question I have to decide, it is utterly irrelevant to consider whether there is in the will an expression of a direction to retain in their hands an adequate sum before any distribution of residue is made. Accordingly, I cannot distinguish in that regard this case from *Cottrell's* case (6), and I must hold, upon the facts of this case, that the annuitants are entitled to have their annuities actuarially valued and the amount of such valuation paid out to them. The actuarial valuation must be, I think, as from the date of this order. I understand that the annuities have been paid up to date, and, if they have not been paid, it is only because it has not been convenient to do so. Accordingly, the annuities will be paid in full up to to-day, and as from to-day the annuities will be valued and the capital sum paid out to the annuitants. Some little difficulty has been caused by the fact that some of the annuitants have died since the date of the death of the testator. I am reluctant to take a course which would shut them out from the benefit of a declaration that they are entitled to have the valuation which I have directed ante-dated, so as to give them the benefit of the payment of a capital sum. I am bound to say, however, that it seems to me clear, upon the authorities which bind me—namely, *Re Dempster, Borthwick* v. *Lovell* (8) and the recent case of *Re Ellis, Nettleton* v. *Crimmins* (9)—that, having died before the date at which I have directed the order to take effect, I must declare that they are not entitled to have anything more than to have the arrears of their annuities made up to them.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *D. G. Verney, Brandreth & Iles*, Southend-on-Sea (for the plaintiff and all defendants except certain legatees and the Public Trustee); *Ashley, Tee & Sons* and *Stileman, Underwood & Taylor* (for the remaining legatees); *The Treasury Solicitor* (for the Public Trustee).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

CONROY *v.* THOMAS WILKINSON & SONS, LTD.

[Court of Appeal (Slesser and Scott, L.JJ., and Farwell, J.), **February 10, 1938.]**

Workmen's Compensation—Industrial disease—Appeal to medical referee—Appeal out of time—Extension of time by registrar—Good cause—Necessity for existence of facts showing good cause—Workmen's Compensation Act, 1925 (c. 84), *s.* 43—*Medical Referees Regulations* (*S.R. & O.*, 1932, *No.* 960), *reg.* 25.

The applicant had applied unsuccessfully for a certificate that he was suffering from an industrial disease. More than ten days after the certifying surgeon had given his decision, the applicant, acting through an approved society, applied for a medical reference. The registrar treated this application as including one for an extension of time, although no such extension of time was applied for nor were there any facts before the registrar relating to that matter:—

Held: it could not be said that the registrar had been shown any good cause for extending the time for making the application. The conditions of the Medical Referees Regulations, 1932, reg. 25, had, therefore, not been fulfilled, and this was not a mere technical matter, which might be waived, but one going to the root of the jurisdiction of the registrar.

[**EDITORIAL NOTE.** Extension of time is generally a mere matter of technicality and can usually be obtained upon terms as to costs. In the present case the limitation of the time is necessary for the proper examination of the employee, and any extension is therefore only to be granted in accordance with the express terms of the regulations.

As to Appeal to Medical Referee, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 167, para. 354; and for Cases, see DIGEST, Vol. 34, pp. 467-469, Nos. 3823-3834. See WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 547-551.]

Appeal from an award of His Honour Judge Essenhigh, dated Sept. 30, 1937, sitting at the Sheffield County Court. The facts, so far as they are material to this report, are fully stated in the judgments.

F. W. Beney for the appellant.

F. A. Sellers, K.C., and *J. R. D. Crichton* for respondents.

SLESSER, L.J.: This is an appeal which arises upon the interpretation of the regulations under the Workmen's Compensation Act, 1925, s. 43. Under that section it is possible for a workman to obtain from a certifying surgeon a certificate that he is suffering from an industrial disease, and, if that certificate is given, the section provides that the workman shall have certain rights of compensation into which it is not necessary here to go.

Edward Joseph Conroy, the applicant, was a workman who thought he was suffering from an industrial disease in such circumstances as to make his employers liable to pay him compensation. Consequently he applied to the certifying surgeon under sect. 43 (1) for a certificate, alleging that he suffered from a disease which is compendiously known as beat knee. The certifying surgeon examined him on Mar. 3, and in his certificate said (these are the material words):

> I am not satisfied that he is suffering from the said disease so as to be disabled from earning full wages at the work at which he had been employed.

There is provided by sect. 43 (1) (*f*) a right of appeal from the decision of the certifying surgeon in these words:

> If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with the regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final.

Those regulations, so far as they are material here, are under sect. 43 (1) (*f*). The Medical Referees Regulations (S.R. & O., 1932, No. 960), reg. 25, provides as follows:

> Where an employer or workman is aggrieved by the action of a certifying or appointed surgeon in giving or refusing to give a certificate of disablement . . . . he may (*a*) if he is an employer, within ten days of the receipt of the notice of disablement . . . . (*b*) if he is a workman within ten days of the receipt of the certificate of the surgeon, apply to the registrar of the county court for the district in which the workman was employed at the time of his examination by the surgeon, for the matter to be referred to a medical referee.

Pausing there, in the circumstances of this case it would have been necessary for the workman to make his application to the registrar by Mar. 13. In fact, in this case Mr. Conroy did not do so, but on Mar. 18, five days out of time, an application was made on his behalf by an approved society looking after his interest, the Catholic Benefit and Thrift Society, which wrote a letter to the registrar in these terms:

> I enclose herewith the under-mentioned in respect of the above-named member of this society. (1) Application (also two copies) for reference of his case to the medical referee under sect. 43 (1) (*f*) of the Workmen's Compensation Act; (2) certificate of the certifying surgeon dated Mar. 3, 1937 (received at this office on Mar. 13, 1937, also two copies); (3) initial medical certificate dated Feb. 10, 1937, issued by member's doctor (also two copies); (4) report of the regional medical officer dated Mar. 11, 1937 (also two copies).

In answer to that letter, as I have said, there came in the usual form an application for referring the case to the medical referee. On Mar. 20 the registrar in the county court of Sheffield wrote to the Catholic Benefit and Thrift Society as follows:

> The application for reference to a medical referee herein was filed out of time.

> The period of filing has, however, been extended by seven days, your letter of the 18th inst. having been treated as an application for extension. The matter has accordingly been referred to a medical referee and the workman notified.

In due course, the case came before the medical referee, who reversed the decision of the certifying surgeon, and gave a certificate to the effect that the man was suffering from the disease. Upon that the matter came before the county court judge. Mr. Crichton appeared for the applicant, the workman, and the facts are as I have stated, Mr. Irwin Mitchell, for the respondents, having agreed that, if the county court judge was against him on the question of good cause, the application under the arbitration would succeed. The judge said:

> In my view, I hold that good cause was shown and the registrar properly exercised his discretion, and therefore in the circumstances there must be an award for the applicant with costs.

The matter which is there decided by the judge arises in this way. I have read that part of S.R. & O., 1932, No. 960, reg. 25, which provides that the workman within ten days of the receipt of the certificate may apply to the registrar. As I have said, in this case he did not so apply, but he seeks to avail himself of the following words, which really constitute the language which has here to be considered:

> Provided that it shall be within the discretion of the registrar, on good cause shown, to extend in any case by not more than seven days the period within which an application is required to be made.

I think that the registrar was entitled to regard the letter of Mar. 18, and the accompanying application, as an application with the proviso to extend the time for seven days, and Mar. 18 would have been within the limits of such extension, but the discretion of the registrar is limited by the rule to cases of good cause shown. It is here said on behalf of the employers that the registrar had before him no material upon which he could come to the conclusion that good cause had been shown. The judge, as I have said, in his judgment formed the opinion that good cause had been shown, or that the registrar, at any rate, was so entitled to hold, and it is from that decision that this appeal is brought.

In my opinion, the respondents have failed to show that there was any cause before the registrar at all upon which he could exercise a discretion to decide that the time should be extended. It is evident, I think, that the only way in which this case could be put to support the judgment of the judge is the way in which it was put by Mr. Sellers, and I think that it is an argument which necessarily fails when it is considered. He says that the letter of Mar. 18, with its enclosures, contained material upon which the registrar could act and find good cause. First of all he says: In para. 2, the approved society, in enclosing the certificate of the certifying surgeon, tells the registrar that it had only received it at their office on Mar. 31, 1937, which was out of time. Had the court to consider whether the approved society could excuse the delay, there might have been some materiality in that matter, but it is the applicant who has to show that he had good cause in delaying to notify the approved society, which was the reason why they, in their turn, were unable to act until Mar. 18. There is no cause shown at all why the workman, being in receipt of the certificate of the certifying surgeon of Mar. 3, delayed until Mar. 13 before he sent the certificate to his approved society to send on to the registrar, except forgetfulness or indolence. I cannot speculate which, save that, in para. 4 of the letter of Mar. 18, 1937, to the registrar, the secretary of the approved society also encloses a report of a regional medical officer of health dated Mar. 11, 1937, and that certificate is a certificate which supports the view which the workman wished the medical referee to consider. It does appear that, on appeal, according to S.R. & O., 1932, No. 960, reg. 26, material may be placed before the medical referee which was not before the certifying surgeon, and the medical referee may consider further medical reports, but no reason has been shown why the report of the regional medical officer was not obtained before Mar. 11, 1937, and, even if there was such a reason, that report, dated Mar. 11, 1937, would have been within the ten days, which would not have elapsed until Mar. 13. Had it been sent on, therefore, immediately upon its receipt, either directly to the registrar or the approved society, the whole matter might have been done in time. In point of fact, there is no ground upon which the registrar can have found that there was a good cause shown. My own belief, so far as I can understand the rather limited amount of material before us, is that the registrar, having received this application, thought that it was a good cause merely in itself to receive an application out of time, unless there was some contrary reason shown. Whether that be so, or whether he purported to act on the matters Mr. Sellers has advanced for our consideration, one of which appears to have been in the mind of the judge, in either case there is no cause here shown. It is either forgetfulness or indolence on the part of the applicant. Finally, I would say that this case is one of importance, because, as SCOTT, L.J., has indicated in the course of the argument, it is right, and in the interest of both employers and workmen, that these regulations should be properly carried out. With regard to the case of the obligation to give notice of an accident, or notice of a claim, which is not excused on the specific ground mentioned in the Act, the courts, ever since the institution of the Workmen's Compensation Act, have had to consider this class of case. It may not have arisen under this particular regulation, but the effect of being out of time without excuse is no novelty for consideration in this court. The principle is the same; the extension is limited, and is a privilege given on certain terms. If those terms are not satisfied, it must follow that the privilege of an extension of time, which is not otherwise provided for in the regulation, is lost. In my opinion, this appeal must succeed.

SCOTT, L.J.: I agree. I also agree with the view of SLESSER, L.J., that this question is one of general importance. On the wording of

sect. 43 (1) (*f*), it is provided that, if the employer or workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement, the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final. The regulations were made, and by reg. 25, which Slesser, L.J., has read, the provision is made with A
statutory force that, where a workman is aggrieved by the action of a certifying surgeon in refusing to give a certificate of disablement (which happened here), he may, within ten days of the receipt of the certificate of the surgeon, apply to the registrar of the county court for the matter to be referred to a medical referee, provided that it should B
be within the discretion of the registrar, on good cause shown, to extend, in any case by not more than seven days, the period of ten days. On the facts of this case, there was no application within ten days, but an application a few days after the expiration of the ten days to the registrar of the county court to refer to a medical referee the question of the C
certifying surgeon's refusal. Upon that, the registrar did refer it to the referee, wholly ignoring the provision of S.R. & O., 1932, No. 960, reg. 25, that the application must be within ten days, and without professing in any way whatever to consider whether or not good cause had been shown, and ignoring that provision of reg. 25. On the D
wording of the regulation, in my view, the appeal must obviously be allowed, first because there was no good cause shown, and, secondly, because the registrar did not purport to grant any extension as an exercise of his own discretion, in accordance with the regulation, upon good cause being shown. E

Mr. Sellers, for the respondents, in this court submitted to us that the question at issue on this appeal was merely a technical one. I confess that I am shocked at the fact that that submission was put forward. He cited, in support of his arguments, a question of a mere matter of procedure of an extension of time for appeal granted by the Court of F
Appeal in an action where the appeal was brought from the decision of the High Court. That is a pure matter of discretion of the Court of Appeal, which has, in my view, no application to this case. This is not in any sense whatever a technical question. It is a question going to the very substance of the cause of action, or right to compensation, G
conferred by the statute. Under sect. 43, an industrial disease is put in the same category as injury by accident, but it is only put in that category if the certifying surgeon appointed under the Factory and Workshops Act certifies that the workman is suffering from a specified disease, and is thereby disabled from earning full wages. In subsect. (1) H
it goes on to say that the workman or his dependants shall thereupon be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications. Then follow the modifications, with which we are all familiar, as to which employer

shall be responsible, rights of indemnity, and so on. Then there is the provision in subpara. (*f*) which says that, if the employer or workman is aggrieved, then the matter shall be referred to a medical referee, whose decision shall be final. The medical referee, when deciding the matter, shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive. The result of those statutory provisions is that the cause of action, the very right of the workman, is dependent upon the certificate of the certifying surgeon, or, alternatively, upon the decision of the medical referee. It is obvious that, the subject-matter of medical inquiry being a disease, and the medical referee being substituted for the certifying surgeon, whose certificate creates the right and confers jurisdiction on the court to deal with the questions under the Act, it is essential that the medical referee, asked to reconsider the report of the doctor, the certifying surgeon, should be put in a position to do that as rapidly as possible after the examination by the certifying surgeon. That is the reason why in reg. 25 the limit of ten days, with a possible extension of seven days for good cause shown, is expressed in such categorical and definite language. It goes to the root of the cause of action and to the jurisdiction of the court to put in force the provisions of the Workmen's Compensation Act. Consequently, the question here is the very reverse of technical. It is fundamental, affecting rights and jurisdiction. It is said here that the letter written by the man's approved society on Mar. 18, after the expiration of the ten days, showed good cause. I entirely disagree with that view. It showed, in my opinion, that there had been a delay by the workman between the receipt of the certificate, which presumably was on the day it was given, namely, Mar. 3, to such an extent as to make it impossible for him, or for the approved society on hearing from him, after that delay, to make an application within the time. This section of the Act contains no provisions that delay by the man's approved society may be treated as a good cause. It obviously would be contrary to the whole intention of the Act that it should be. Under the National Health Insurance Act, 1924, the right of a workman to utilise the services of his approved society is conferred, and by sect. 53 the society may take proceedings and thereby assist the workman, but sect. 43 of the Workmen's Compensation Act is a section which imposes perfectly clear conditions on the right of the workman to come to the court and say, "I am suffering from a disease, and have the necessary certificate of the certifying surgeon, which creates my right."

In those circumstances, in my view, this is an appeal that affects a fundamental question of right. There was here no evidence at all of good cause shown, and no evidence of the exercise by the registrar of his discretion. The Act makes it his duty, and his alone, to exercise discretion on the question of the extension of time for reference to the medical referee.

FARWELL, J.: I agree.

Appeal allowed.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellant); *Gasquet, Metcalfe & Walton,* agents for *E. R. Hoskinson,* Liverpool (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

EASTERLING *v.* PEEK, FREAN & CO., LTD.

[COURT OF APPEAL (Slesser and Scott, L.JJ.), **February 17, 24, 1938.**]

Workmen's Compensation—Industrial disease—Disability stated to have commenced more than six months before date of certificate—Notice of claim—Reasonable cause—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 14 (1), 43 (1).

An employee was certified on June 4, 1937, to be suffering from dermatitis, and the certifying surgeon certified that the disablement commenced on Sept. 11, 1936, a date more than six months prior to the date of the certificate. In 1932 she had gone to the respondents' own doctor about an irritation on her left hand, but was not told what the disease was. From then until she left their employment on Sept. 11, 1936, she went to the doctor about every three months. On Apr. 6, 1937, she went to her own doctor, and was told for the first time that she was suffering from dermatitis. From then on she went to her doctor each week, until at the beginning of June she was sent to Guy's Hospital, and obtained a certificate from a certifying surgeon:—

HELD: in the absence of all information from the respondents' doctors, and in the absence of any previous symptoms to lead her to believe, that she was suffering from any certifiable disease other than that for which she had consulted them, and as, upon learning her real condition on Apr. 6, 1937, she immediately, after treatment at the hospital, went to the certifying surgeon, there was an inference that reasonable cause for not making a claim within six months was shown by her.

[**EDITORIAL NOTE.** The judgments in this case are based largely upon a passage in the opinion of LORD ATKIN in *Kitchen* v. *C. Koch & Co., Ltd.* (2), where he states that there is no claim until the workman has received a certificate from the certifying surgeon, and that until then there is no accident in respect of which a claim can be made. Upon this view of the matter, it would seem that, in a case where the surgeon certifies that the disablement commenced at a date more than six months before the date of the certificate, there is an irrebuttable presumption that the workman has reasonable cause for not giving notice of his claim within six months of the date of the accident.

AS TO NOTICE OF CLAIM, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 180, para. 383; and FOR CASES, see DIGEST, Vol. 34, pp. 369-375, Nos. 2998-3038. See also WILLIS'S WORKMEN'S COMPENSATION, 31st. Edn., pp. 398-413.]

Cases referred to:

(1) *Holt* v. *Hobson (Andrew) & Sons* (1930), 23 B.W.C.C. 242; Digest Supp.

(2) *Kitchen* v. *Koch (C.) & Co., Ltd.,* [1931] A.C. 753; Digest Supp.; 100 L.J.K.B. 459; 145 L.T. 618; 24 B.W.C.C. 294; *on appeal from* (1930), 23 B.W.C.C. 349.

(3) *Gwilym* v. *Aberbeeg Collieries, Ltd.* (1936), 155 L.T. 598; Digest Supp.; 29 B.W.C.C. 273.

(4) *Moore* v. *Naval Colliery Co., Ltd.*, [1912] 1 K.B. 28; 34 Digest 374, *3033*; 81 L.J.K.B. 149; 105 L.T. 838; 5 B.W.C.C. 87.

(5) *Lingley* v. *Firth (Thomas) & Sons*, [1921] 1 K.B. 655; 34 Digest 374, *3035*; 90 L.J.K.B. 290; 124 L.T. 442; 13 B.W.C.C. 367.

APPEAL from an award of His Honour JUDGE BENSLEY WELLS given at the Southwark County Court on Oct. 7, 1937.

Hon. Sir Stafford Cripps, K.C., and *G. Granville Slack* for the appellant.

James MacMillan for the respondents.

SLESSER, L.J.: This cases raises a difficult question of construction under the Workmen's Compensation Act, 1925, which has been before the courts on several occasions, but which I think has never been definitely decided. The problem arises in this way. By sect. 14 (1) of the 1925 Act, it is provided that proceedings for the recovery under the Act of compensation shall not be maintainable unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident occasioning the injury; provided that:

> . . . (*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it was found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

By sect. 43 (1) of the same Act, where the certifying surgeon duly appointed certifies that the workman is suffering from certain diseases and is thereby disabled from earning full wages at the work at which he was employed, and that the disease is due to the nature of certain employments, he shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of the employment, subject to the following modifications: (*a*) "the disablement shall be treated as the happening of the accident." I omit words here not material.

In this case, the applicant, Ethel Easterling, was certified on June 4, 1937, to be suffering from a scheduled disease described as dermatitis, produced by dust or liquids, and the surgeon further certified that the disablement commenced on Sept. 11, 1936. In so far as the disablement is to be treated under sect. 43 (1) (*a*) as the happening of the accident, applying sect. 14, the claim would have to be made within six months from the occurrence of that accident, which date would be, at the latest, Mar. 11, 1937. At that time, the applicant had not been certified to be suffering from a scheduled disease, and was not, therefore, in a position to know proleptically that she would thereafter, on June 4, be able to be so retrospectively certified. In these circumstances, it is contended by Sir Stafford Cripps that she must of necessity have had a reasonable cause for not making a claim within six months. Alternatively, he contends, if the facts of this particular case are to be considered, that the county court judge was wrong in law in coming to the conclusion that there was here no reasonable cause shown by her.

On the first contention, if it be correct, in circumstances such as these, the workman is relieved from any further obligation to show reasonable cause when once he has shown by the date of the certificate that the disablement commenced more than six months before he received it. If the retrospective period found were less than six months, it would appear that the court might inquire into the question as to whether or not, during a part of the unexpired period of six months in which there was a possibility of making a claim, the workman had unreasonably abstained from making it. This, I think, is the effect of the decision of the majority of this court in *Holt* v. *Andrew Hobson & Sons* (1), where ten days from the six months were open to the workman in which to make his claim. That case is of no assistance in solving the present problem.

In my view, apart from authority, I find it impossible to see how a man can be said to be without reasonable cause when he does not make a claim within the period of six months during the whole of which he had not in law been certified to have suffered that notional accident which alone could give him the right to make the claim. The only possible way in which it could be said that such a man had forgone his rights would depend upon the contention that, in a particular case, knowing his condition, by medical advice or otherwise, he negligently had abstained from applying to the certifying surgeon to give him a certificate. The reasonable cause contemplated under sect. 14 is one which exempts him from making a claim. There is no reasonable cause to be considered in respect of failing to present himself to the certifying surgeon, for the very good reason that no duty so to present himself is to be found in the statute. As Lord Atkin has tersely put it in the case of *Kitchen* v. *Koch* (*C.*) *& Co., Ltd.* (2), at p. 766:

> Reasonable cause for failure to make a claim for an accident seems to me a different thing from reasonable cause for failure to make an accident.

There is no obligation upon the workman under sect. 43 or otherwise to obtain a certificate and so to create a notional accident within any particular time.

For this reason, as a matter of principle unfettered by authority, I should have held that as a matter of law it must be reasonable cause that, during the six-months' period in which a man may ordinarily claim, he could not produce the certificate which constitutes the accident which alone could support any claim at all. If this be right, the facts of any particular case become immaterial once it is established that the certificate produces an accident retrospectively more than six months before the date of granting it; the reasonable cause is sufficiently established as a matter of law, and the workman has discharged whatever limitation may otherwise be imposed upon him as to time under sect. 14.

I turn to the decided cases to see whether they bind me to hold anything to the contrary. So far as this court is concerned, in the recent case of *Gwilym* v. *Aberbeeg Collieries, Ltd.* (3) the view was expressed by Scott, L.J., and by myself that the matter was still open for consideration. In my view, this present appeal on the finding of the judge makes necessary a decision on this point, for the county court judge, on the facts which I have stated as to the dates of the certificate and its contents, has held that the onus was on the applicant to satisfy him that there was reasonable ground for not making the claim within six months from Sept. 11, 1936, and that the applicant has failed to discharge that onus.

The only case in which this matter has been considered directly in the House of Lords is the case of *Kitchen* v. *Koch* (*C.*) *& Co., Ltd.* (2). There a workman obtained a defective certificate on July 4, 1929, which, as Lord Warrington of Clyffe points out, was not in fact a certificate under the Act at all. On Nov. 19, 1929, the workman was examined a second time, and a second certificate was given, which was defective because of its unintelligible date of disablement. Finally, on Jan. 18, 1930, a valid certificate was given, giving the date of disablement as May 23, 1929—the word " May " had been left out of the second certificate —which gave a date for disablement admittedly more than six months from the date of the certificate. The county court judge held that the workman was out of time, and in the Court of Appeal he was upheld. In this court, I do not think that the more general proposition, that, in any event, having regard to the dates, there must in law have been a reasonable cause, was advanced by Mr. Cave, who appeared for the appellant workman. Lord Hanworth, M.R., says that the workman had failed to make good by proving reasonable cause—after dealing with the particular facts of the case. I point out in 23 B.W.C.C., at p. 361 :

> But Mr. Cave does not suggest, I think, and certainly I am not prepared to hold that that [*Moore's*] case (4), which accepted that view in broad principle, is laying down any general principle of law beyond this, that there may be cases where it would be proper to hold that there was reasonable cause when the only ground why the workman had not claimed was because the certificate had a retrospective effect which carried the matter back more than six months before the date of the claim.

So also Romer, L.J., says, at p. 363 of the same report :

> The learned county court judge has found as a fact that there is no satisfactory explanation given as to why the workman delayed submitting himself for further examination by the certifying surgeon and getting his certificate until Nov. 19.

In the House of Lords, Mr. Cave again abstained from basing his argument on any more general question of law. The House held, as I read their opinions, unanimously that, in the circumstances of that case, the proper view was that the workman had established a reasonable cause, and they therefore reversed the decision of the Court of Appeal and the county court judge, but the more general principle of law, whether on the dates the workman was relieved from establishing anything more than the impossibility of making a claim, was certainly discussed by several of their Lordships, with differing opinions. The views which I have here tentatively expressed find direct support in the opinion of Lord Atkin, who points out, at pp. 764, 765 :

> By the provisions of the Act as to industrial diseases it is plain that the workman

> has no claim under the Act unless and until he has received a certificate from the certifying surgeon. Until then he has not met with an accident, which under the Act is the disability certified by the surgeon; and he does not know the date of the accident, for that is the date of the disability, which can be fixed only by the certifying surgeon. He cannot, therefore, give notice of the accident or make a claim until there is a certificate. By the provisions of sect. 14 the claim must be made within six months from the occurrence of the accident. When, therefore, as in the present case, the date of disablement is fixed at a date more than six months earlier than the certificate, it is impossible to comply with the Act. . . . Two possible views emerge. Either the obligation to make a claim within six months does not exist where it is impossible in fact and in law to make any claim: or the failure to do what is impossible is excused, because impossibility is reasonable cause for not doing the impossible, I am bound to say that I prefer the first alternative.

He points out that this view was expressed by Sir H. H. Cozens-Hardy, M.R., possible only as dictum, in *Moore's* case (4), and continues, at p. 765:

> But though I hold this view, I am satisfied to deal with the present case on the footing that the latter alternative applies; and that the question is whether there is reasonable cause for failure to make the claim within six months. On this assumption the workman surely discharges the onus upon him of showing reasonable cause by proving that it was in fact and in law impossible to make the claim at any time before the certificate.

He then points out that, in his view, the question as to whether the workman acted unreasonably in not procuring the certificate of the surgeon so as to procure for himself a dated accident for which he could claim is beside the point. He can find no such obligation, and he dissents from the view of Farwell, L.J., in *Moore's* case (4), where he had said, at p. 35:

> . . . the point we have to consider is not so much whether the claim was unreasonably delayed, as whether the visit to the certifying surgeon was unreasonably delayed.

Lord Atkin comments, at p. 766:

> The first question is within the scope of the sub-section; the second I cannot find in the sub-section.

It is right to say that no other of their Lordships expresses himself in language which seems to support the views of Lord Atkin. Indeed, Lord Thankerton appears to say the opposite in these words, at p. 768:

> I agree that primarily it is for the workman to prove the "reasonable cause," and that unreasonable delay in presenting himself for examination by the certifying surgeon is an element to be taken into consideration by the court . . .

Lord Blanesburgh, at p. 758, dissents from the view of Sir H. H. Cozens-Hardy, M.R., in *Moore's* case (4), that, in the circumstances, we are here considering whether a

> . . . certificate may go back a long time, certainly twelve months, that a workman is disabled from presenting after the expiration of six months an application in which the date of the accident has to be stated, when the certificate, which alone fixes the date of the accident, may fix it more than six months back.

This is dealing, I think, rather with the first of the alternatives of Lord Atkin, that in such circumstances the obligation to make a claim within six months does not exist, than with his second alternative, that in such a case there is of necessity reasonable cause. Lord Warrington of

Clyffe, at p. 763, quotes Sir H. H. Cozens-Hardy, M.R., in *Moore's* case (4) without comment, neither in terms agreeing with nor dissenting from the views of Lord Atkin. In my judgment, in all these circumstances, seeing that the House of Lords there held that there was on the facts reasonable cause, I do not think that what was there laid down amounts to any denial of the view that, in any circumstances, the workman may show reasonable cause for abstaining from a claim in cases where, in fact, he could not, during the six months following the date of the disablement as found by the certifying surgeon, make an effectual claim.

Of the alternatives suggested by Lord Atkin, for myself I favour the latter view. While it is true that in certain cases compliance with the provisions of statutes which prescribe how something is to be done will be excused if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances, yet here I think that the provision in the statute itself of the excuse of reasonable cause is sufficient to justify the view that sect. 14, with the benefit of this exception to its obligations, can be wedded to sect. 43 without producing an impossibility. It was upon this view that Lord Atkin ultimately proceeded, and it commends itself to my mind. In so far as Lord Hanworth, M.R., expressed a view in *Holt's* case (1), at p. 253, that the workman should have seen a certifying surgeon earlier, as I pointed out in *Gwilym's* case (3), I respectfully disagree. My own view in *Holt's* case (1), and, I think, that of Romer, L.J., was based upon the failure of the workman to make his claim between the giving of the certificate and the time when he actually made the claim, which, in our opinion, left open the question as to whether, on the facts, there was or was not reasonable cause. In *Holt's* case (1), a claim was possible, though the time for making it was short, and, if there be anything said in the Court of Appeal in *Kitchen* v. *Koch (C.) & Co., Ltd.* (2) to the contrary, I think that the reversal of that decision in the House of Lords now leaves the matter *res integra*.

Finally, I would say that, if my view of the law be erroneous on this head, and if the question can be considered as to whether, in the circumstances, there was any obligation upon the applicant to present herself earlier than she did to the certifying surgeon, I think that the county court judge was wrong in his conclusion that she had not reasonable cause. The evidence goes to show that as early as 1932 the applicant went to the respondent's own doctor about an irritation on her left hand, and he did not tell her what it was. She went again in two or three days, when a second ointment was applied, and went to the doctors at intervals until she left, sometimes seeing Dr. Ross and sometimes other doctors of the respondents who were there one after another. Later, when she was doing a different type of job on her own request, a labelling job, she found out that some of the girls had a rash from doing it, but her hands improved a lot. Up to that time, she had it on the left hand only, except very slightly once on the right. During the last period of her employment with the respondents, she went to the doctor once in every three months, until she left on Sept. 11. Her housework after she had married caused the rash and irritation to break out again, and on Apr. 6, 1937, she went to her own doctor, Dr. Taylor, who for the first time told her she had dermatitis. From Apr. 6, 1937, until the arbitration, she attended him every week. He sent her to Guy's Hospital at the end of May or beginning of June, and on June 7 she obtained her certificate from the surgeon.

On these facts, it would appear that the doctors for the respondents at all times left her in ignorance as to the nature of her disease, and, after she left, when the disease broke out again as a consequence of her housework, she consulted her own doctor, who for the first time on Apr. 6, 1937, told her that she suffered from dermatitis. This was, of course, more than six months after Sept. 11, 1936, the date fixed by the certifying surgeon for the beginning of the disablement. In my view, on these facts, the proper conclusion in law is that, in the absence of all information from the respondents' doctors, who constantly examined her, and in the absence of any previous symptoms to lead her to believe that after she left her work she suffered from any certifiable disease other than that for which she had consulted them, no sooner was she apprised of her real condition on Apr. 6, 1937, than, immediately after treatment at Guy's Hospital, she went to the certifying surgeon. I see no reason to suppose that she unduly delayed her visits to him, assuming that she was under any duty to go to him earlier than she did—an assumption which, for the reasons I have pointed out, I follow Lord Atkin in declining to make. This appeal therefore succeeds, and will be allowed with costs.

Scott, L.J.: I agree with the conclusion of Slesser, L.J., that this appeal must be allowed. He has stated the facts, and I need not repeat them. The important question of law arises from the first and second grounds in the notice of appeal. They were intended to raise the two possible views of the legal position which arises in a case of industrial disease under sect. 43 of the Act, where the date of disablement certified by the certifying surgeon is more than six months anterior to the certificate, namely, (i) that in such a case the six-months' limit of sect. 14 has no application at all, and, alternatively, (ii) that, if in theory it should be regarded as applicable, there must as a conclusion of law be a finding of "reasonable cause." The legal choice between these two is academic, because on either view the bar to proceedings is excluded.

In the present case, if either is right, the appeal must be allowed. Conversely, each ground may be a true *ratio decidendi* upon which to rest our judgment. The statement in the notice of appeal of the two grounds of appeal is no doubt framed upon the well-known passage in the opinion of Lord Atkin in *Kitchen* v. *Koch* (*C.*) *& Co., Ltd.* (2), at pp. 764, 765, to which Slesser, L.J., has referred. In that case, the basic facts were similar to those in the present case. I humbly subscribe to the whole of what Lord Atkin there said, and regard his exposition of principle as so important that it is best to quote in full the passage, at p. 764 :

> By the provisions of the Act as to industrial diseases it is plain that the workman has no claim under the Act unless and until he has received a certificate from the certifying surgeon. Until then he has not met with an accident, which under the Act is the disability certified by the surgeon ; and he does not know the date of the accident, for that is the date of the disability, which can be fixed only by the certifying surgeon. He cannot, therefore, give notice of the accident or make a claim until there is a certificate.

After referring to sect. 14, he continued, at pp. 764, 765 :

> Two possible views emerge. Either the obligation to make a claim within six months does not exist where it is impossible in fact and in law to make any claim : or the failure to do what is impossible is excused, because impossibility is reasonable cause for not doing the impossible. I am bound to say that I prefer the first alternative—*lex non cogit ad impossibilia.*

Then, referring to the words requiring that the claim shall be made within six months of the accident, he said, at p. 765 :

> When the words in the widest sense are capable of applying to cases where the obligation can be performed and to cases where the obligation cannot be performed, it seems to me a sound rule of construction to infer that the legislature only intended to impose an obligation that could be performed. This is the view expressed, probably only as a *dictum*, by Cozens-Hardy, M.R., in *Moore* v. *Naval Colliery Co., Ltd.* (4), at p. 31.

The House definitely did not decide the case on the first ground, and did not in terms purport to adopt the second view of Lord Atkin. It allowed the appeal because it held that, on the undisputed facts, only one legal conclusion was possible—namely, that reasonable cause had been proved. If this court is free to adopt either or both of the views of Lord Atkin, and is not precluded by authority, I think that we ought to express our respectful acceptance of both, and to apply both to the simple facts of the present case, which are identical with those present in *Kitchen's* case (2). The first view of Lord Atkin compels my assent just as irresistibly as does the second.

When first passed by Parliament, the provision which is now contained in sect. 14 (1), and which was then sect. 2 of the Act of 1897, did not contain the present proviso (*b*) to sect. 14 (1). It was addressed only to real accidents, as industrial diseases had not then been brought into workmen's compensation. They were brought in by sect. 8 of the 1906 Act, sub-sect. (1) of which is in the same terms as is the present sect. 43 (1). At the same time, the present proviso (*b*) to sect. 14 (1) was added in sect. 2 of the 1906 Act. I do not doubt, therefore, that sect. 43 compels the court to treat sect. 14 as applicable to the notional accidents created by the terms of sect. 43, so far as it is possible to do so, interpreting sect. 14 in the light of sect. 43 when so applying it. It is just there, however, that the difficulty of applying the six-months' limit to the notional accident arises. Where the whole six months have elapsed before the certificate is given, the plain logic of the situation seems to me to lead necessarily to the first view of Lord Atkin. The six-months' bar cannot apply, but the logic of that interpretation is supported by a consideration of what appears to me to be the policy of sect. 14. It is true that the limitation, as has often been pointed out, is for the protection of the employer from stale claims, and from the inherent difficulty of keeping evidence available to test stale claims, or of recollecting it; but why did Parliament allow so long a limit as six months in contrast to the promptitude required for notice of the accident? Surely because it was thought fair and reasonable to give the workman that length of time from the date of the accident to think over his prospect of enforcing a claim which his employer has in effect told him he will fight, by failing, after receipt of the notice of the accident, to agree to pay compensation. These reasons lead me to the conclusion that sect. 14 must be construed as giving the workman an absolute right to substantially the full period of his six months for reflection. If there were in either sect. 14 or sect. 43 any provision to mitigate the prejudice to the workman caused by a shortening of his six months from the date of the notional accident through the ante-dating of it in the certificate, the position would be different; but there is none. The result is that I cannot regard it as consistent with the policy of sects. 1 and 43 of the Act, which confer the basic right to compensation, to construe sect. 14 as depriving him of it by the six-months' bar unless he has the whole six months to decide what course of action he will pursue in view of his employer's failure, upon notice of the accident, to accept liability. It is no answer to the argument, if sound, to say that the deprivation of right by the time-bar will be avoided if there is reasonable cause for delay. The enjoyment of the six-months' period must be an actual possibility before the proviso giving relief from its bar can begin to be relevant. The conclusion that the bar does not apply at all unless the whole six months are available seems to me more consistent with the spirit of sects. 1 and 43 than the interpretation of sect. 14 as applying its absolute bar, even when the workman has only a mere fraction of his six-months' period still left at the moment when he first learns of the date of his notional accident. The result is, in my opinion, that the six-months' bar has no application in cases of industrial disease or silicosis (for sect. 47 is analogous to sect. 43), where the disablement is antedated, at any rate by more than a day or so, where the curtailment might possibly be negligible under the rule of *de minimis non curat lex.*

I recognise that partial deprivation of the full six-months' period does not arise directly in the present case, and that consequently what I have said is to that extent *obiter*, but, if the policy of the Act be what I think it is, it affords an almost conclusive support—if support be needed, which I do not think it is—to the purely logical reasoning of the first view of Lord Atkin.

If, on grounds of policy, some *via media* would afford a fairer adjustment between the employer and the workman, it is open to Parliament to enact some suitable compromise. As the Act is now expressed, however, the above conclusion seems to me to accord with its true meaning.

Let me now consider the question of authority. I do not think that there is any definite decision which precludes this court from adopting A the first view of LORD ATKIN, that, where the certificate antedates the notional accident by more than six months, the bar has no application. As regards my supporting argument—that the Act intends the workman to have the full benefit of his six-months' privilege—there is, I believe, only one decision in the way, and that is definitely against it. I refer B to *Holt* v. *Andrew Hobson & Sons* (1). I will return to it presently. Decisions in cases like *Moore* v. *Naval Colliery Co, Ltd.* (4), where the certificate antedated the accident by more than six months, and the court held that there was reasonable cause, obviously do not touch the first view of LORD ATKIN. Indeed, decisions affirming the existence of C reasonable cause do not touch my first proposition any more than that of LORD ATKIN. Decisions in cases concerned with real accidents, such as *Lingley* v. *Thomas Firth & Sons* (5), which was cited to us, are beside the point, but the case in this court of *Holt* v. *Andrew Hobson & Sons* (1) is inconsistent with my view. That case was not one of industrial D disease under sect. 43, but a silicosis case under sect. 47. It is, however, in point, because the relevant provisions contained in sect. 47 and para. 11 of the Silicosis Scheme then in force are identical in effect with sect. 43. There the notional date of the accident was fixed by the surgeon very nearly six months before the certificate, but there were ten days left E for the workman to claim before the six months expired. The workman made his claim two days after the last of these ten days. The county court judge took into account delay in going to the certifying surgeon at a much earlier date, and, adding that factor to the delay during the ten days at the end, held that there was no reasonable cause, and F rejected the claim. This court dismissed the workman's appeal. LORD HANWORTH, M.R., took the same view of the law as did the county court judge, and thought that the delay in going to the surgeon for a certificate was an element to consider on "reasonable cause," although he relied on a different period in the story from that which the county court G judge thought material. SLESSER and ROMER, L.JJ., in very short judgments concurred in his conclusion, but solely on the ground that the workman still had ten days within which to claim. They were careful to avoid indorsing the view of LORD HANWORTH, M.R., that delay in going to the certifying surgeon was a relevant factor in deciding whether H reasonable cause existed for the claim not having been made within the six months. In a later silicosis case, *Gwilym* v. *Aberbeeg Collieries, Ltd.* (3), SLESSER, L.J., during argument, pointed out that "there is no such obligation in the Act or scheme." I realise that the decision would have been impossible if my view had been the test, and that therefore that decision is *prima facie* an obstacle to my view, but I do not think that it is an authority for the proposition that the court is entitled to pay any attention to the question of delay by the workman in going to the certifying surgeon after acquiring knowledge that he has a certifiable disease. The view of LORD HANWORTH, M.R., was only an *obiter dictum*, and I respectfully disagree with it. There being no express provision in sect. 43, either as a directory requirement or as a condition precedent to the right to a certificate, to indicate that it will make any difference in the legal sense to the workman how soon he goes, or how slow he is in going, to the certifying surgeon, it seems to me impossible to infer a duty of diligence in that respect. The Act seems to have assumed that the man's sense of self-interest would suffice. The decision in *Holt's* case (1) being plainly contrary to part of the reasoning by which I support my major view, it is essential to consider to what extent it is binding on this court to-day.

I will begin with the view of LORD HANWORTH, M.R., of the supposed duty of the workman to avoid delay in going to the certifying surgeon. In *Kitchen's* case (2), the Court of Appeal took the same view as LORD HANWORTH, M.R., did in *Holt's* case (1) with regard to the supposed duty of a workman disabled by an industrial disease within the Act to be diligent in going to the certifying surgeon, and LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ., in terms affirmed that duty—ROMER, L.J., citing a similar expression of opinion by FARWELL, L.J., in *Moore* v. *Naval Colliery Co., Ltd.* (4)—and treated a failure in that duty as germane to the question of reasonable cause. In the House of Lords, LORD THANKERTON assented to this idea of duty on the workman in these words, at p. 768:

> I agree that primarily it is for the workman to prove the "reasonable cause," and that unreasonable delay in presenting himself for examination by the certifying surgeon is an element to be taken into consideration by the court. . . .

He was the only member of the House, however, who did express that view. LORD BLANESBURGH, who delivered the leading opinion, concurred in by LORD DUNEDIN who had not heard the whole argument, made no mention of it. LORD WARRINGTON expressed himself in terms which I think indicate his disagreement with it, or, if the passage in question should be otherwise construed, was silent about it. He said, at p. 763:

> Much reliance was placed on a finding of the arbitrator that during the whole period from July 24, 1929, to Jan. 18, 1930, the appellant and Whitworth, the trade union secretary, knew that the appellant had epitheliomatous cancer. But with all respect, this is not the point; the question is when did they, or either of them, first know the date of the occurrence (as it is called in sect. 14) of the accident? This they knew for the first time on Jan. 18, 1930, when the surgeon gave his certificate of that date certifying that disablement commenced on May 22, 1929.

LORD ATKIN, after considering the question with which I dealt at the beginning of my judgment, proceeded on the alternative basis, and assumed that there was still an issue to decide about reasonable cause, the relevant dates being: certificate, Jan. 18, 1930; certified date of notional accident, May 22, 1929; written notice of claim, Jan. 30, 1930. At pp. 765, 766 there is this passage:

> On this assumption the workman surely discharges the onus upon him of showing reasonable cause by proving that it was in fact and in law impossible to make the claim at any time before the certificate. I should again have thought this to be a complete and final discharge of the onus. But it is suggested that there is a further A inquiry to be made—namely, whether the workman during the period of six months from the certified date of the disability has acted unreasonably in not procuring the certificate of the surgeon so as to procure for himself a dated accident for which he can claim. My Lords, I am bound to say for myself that I cannot find such an obligation in the bond. Reasonable cause for failure to make a claim for an accident seems to me a different thing from reasonable cause for failure to make an accident. I therefore think that FARWELL, L.J., construed the section too B rigorously when in *Moore* v. *Naval Colliery Co., Ltd.* (4) he said the question "is not so much whether the claim was unreasonably delayed, as whether the visit to the certifying surgeon was unreasonably delayed." The first question is within the scope of the sub-section, the second I cannot find in the subsection. No doubt the result would be that a workman suffering from an industrial disease might delay getting the certificate and so delay for years the occasion for a claim. But in view of the fact that he would in the interval not be getting compensation, and would run the risk of not being able to prove that the disablement commenced C within twelve months of his last employment, the practical disadvantage to the employer does not seem serious.

It is true that LORD ATKIN went on to say that it was not necessary to decide the point, as the House was unanimous that, even assuming that the question of unreasonable delay in getting the certificate arose, there D was reasonable cause. What I have said of the views expressed is, I think, sufficient to release us to-day from the trammel of *Holt's* case (1) as a binding decision on that point, and I venture therefore humbly to say that, in my opinion, on that point the court's decision was wrong.

The county court judge held in the present case that reasonable cause E was disproved, because the applicant ought, in the light of what she knew about the state of her hands, to have made a claim earlier. On this point, therefore, he was wrong. The fact that the House of Lords disapproved of the view expressed by LORD HANWORTH, M.R., in *Holt's* case (1)—that delay by a workman in getting his certificate is an element F to be taken into account in considering delay after getting the certificate —does not of itself negative the authority of *Holt's* case (1) as a decision upon the other point—namely, that the six-months' bar may still apply, even although most of the period is already past at the date of the certificate.

G All I can say, therefore, is that I express the view that the workman is entitled to his whole period of six months with hesitation, and subject to the doubt that I ought perhaps to treat myself as precluded from relying on it as an additional reason why, where he has none of it left, the bar must as a matter of law be treated as wholly out of the statutory H picture. Whether or not this reason is open to us in this court does not really matter, unless there be a doubt on the first proposition of LORD ATKIN, which I do not think there is.

That the alternative view of LORD ATKIN must apply if his first is wrong I have no doubt. Impossibility of doing a thing must constitute a "reasonable cause" for not doing it. In any view of the case, I have no hesitation in saying that the undisputed facts necessarily establish the inference of reasonable cause.

Appeal allowed with costs in both courts.

Solicitors: *W. H. Thompson* (for the appellant); *Gardiner & Co.* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

DAY *v.* DAVIES.

[COURT OF APPEAL (Slesser, Scott and Clauson, L.JJ.), **February 3, 24, 1938.**]

Distress—Distress for rent—Bailiff in possession—"Walking possession"—Whether any charge can legally be made for bailiff's expenses—Distress for Rents Act, 1737 (*c.* 19), *s.* 10—*Distress* (*Costs*) *Act*, 1817 (*c.* 93), *ss.* 1, 2—*Distress* (*Costs*) *Act*, 1827, (*c.* 17)—*Law of Distress Amendment Act*, 1888 (*c.* 21), *s.* 8—*Distress for Rent Rules* (*S.R. & O.*, 1920, *No.* 1712), *r.* 22, *appendix* 2.

The plaintiff, a certificated bailiff, had distrained the goods of the defendant. In order to avoid having a man in possession, the defendant agreed that the plaintiff should have "walking possession," and undertook to pay the costs thereof. The bailiff made a charge of 6*s.* a day, being the amount allowed for a man in possession by the Distress for Rent Rules, 1920, appendix 2:—

HELD: (i) the constructive possession was an act in the course of the distress, and therefore no charges could be made other than those provided by the rules. There being in fact no man in possession, there was no power to make a charge.

(ii) as the agreement was to do something forbidden by statute, it was invalid.

[EDITORIAL NOTE. It has long been the practice to avoid the inconvenience to the tenant of a bailiff being in actual possession by the bailiff being in what has been termed walking possession. The arrangement is that the bailiff, receiving (i) his fee as if he were in actual possession, (ii) an undertaking that the goods will not be removed, leaves the premises for an agreed time. It is here decided that this arrangement is unlawful, and therefore unenforceable so far as the recovery of the fees is concerned.

AS TO WALKING POSSESSION, see HALSBURY, Hailsham Edn., Vol. 10, p. 520, paras. 713-715; and FOR CASE, see DIGEST, Vol. 18, p. 426, No. 1635.]

Cases referred to:

(1) *Walker* v. *Retter*, [1911] 1 K.B. 1103; 18 Digest 355, *931*; 80 L.J.K.B. 623; 104 L.T. 821.

(2) *Lumsden* v. *Burnett*, [1898] 2 Q.B. 177; 18 Digest 426, *1635*; 67 L.J.Q.B. 661; 78 L.T. 778.

(3) *Robson* v. *Biggar*, [1907] 1 K.B. 690; 18 Digest 356, *934*; 76 L.J.K.B. 248; 96 L.T. 271; *on appeal*, [1908] 1 K.B. 672.

(4) *Bisgood* v. *Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743; 9 Digest 195, *1226*; 77 L.J.Ch. 486; 98 L.T. 809.

(5) *Cowan* v. *Milbourn* (1867), L.R. 2 Exch. 230; 12 Digest 277, *2269*; 36 L.J.Ex. 124; 16 L.T. 290.

(6) *Admiralty Comrs.* v. *Valverda* (*Owners*), [1938] 1 All E.R. 162; Digest Supp; 107 L.J.K.B. 99.

APPEAL from a decision of His Honour JUDGE DALE, sitting at the Birmingham County Court, dated Oct. 7, 1937. The facts of the case are set out in the judgment.

H. J. Astell Burt for the appellant (the defendant).

B. Stuart Horner for the respondent (the plaintiff).

Astell Burt: The statutory charge for a man in possession is 6*s*. a day. A bailiff is entitled to charge if there is an agreement binding on the tenant, even if the man is not actually in possession: see *Lumsden* v. *Burnett* (2). [Counsel also referred to *Robson* v. *Biggar* (3) and *Walker* v. *Retter* (1).] One can contract out of the statute. [Counsel referred to *Admiralty Comrs.* v. *Valverda* (*Owners*) (6).] In any event, if he is not entitled to 6*s*. a day, he is entitled to make a reasonable charge.

Stuart Horner was not called on.

SLESSER, L.J.: This case is of considerable importance to bailiffs and those who are reluctantly compelled to entertain them. On Apr. 30, 1937, John Davies, a certificated bailiff, gave notice to the plaintiff and his wife that he had that day distrained their several goods and chattels mentioned in the schedule in and upon their dwelling-house at 28, Low Wood Road, Erdington, in the city of Birmingham, for £5 10*s*., being arrears of rent due to the landlord, and on the same day the plaintiff agreed with John Davies that, in consideration of his not leaving a man in possession, he should have what has been called a "walking possession." The agreement was in the following terms:

> To John Davies. In consideration of you holding possession at 28, Low Wood Road under distraint for rent, please do not leave man in possession but holding walking possession and I will pay all costs being for my convenience.

The county court judge says that in fact the bailiff

> never put a man in possession at all, but merely visited the plaintiff's premises for a few minutes on each of five days . . . this method of taking possession I am told is often done and is known as constructive possession or "walking possession."

The bailiff proceeded to charge 6*s*. on the first day and for five subsequent days, a total of £1 16*s*. On the last day on which the bailiff came, the plaintiff paid him £4 10*s*., and now claims that £1 16*s*. of the money paid should be returned to him, that sum being the amount paid in respect of the fees and charges for six days at 6*s*. a day.

The case first came before the registrar in the county court, and he held that the bailiff had no right to charge 6*s*. a day during the time in which he held only "walking possession." There was an appeal to the county court judge, who upheld the decision of the registrar. From this decision the defendant, the bailiff, now appeals to this court. In the county court, the question as to whether on any view the plaintiff could recover the money so paid by him to the bailiff, even if he were right in his contention that the bailiff in law was not entitled to payment, was not argued, nor does that consideration form any part of the county court judge's judgment. Mr. Astell Burt, for the defendant, does not take the point, saying that he desires to have the case decided rather upon the footing that, if he is wrong in his contentions, the plaintiff would be entitled to the recovery of his money. I come, therefore, at once to the issues litigated in this case before the county court judge.

In the case of there being a man lawfully in possession, the right to charge has been made the subject of legislation and of rules. By the Distress for Rents Act, 1737, s. 10, it was provided that distress might be secured and sold on the premises. Before that time, distress generally could not be impounded on the premises unless the tenant otherwise agreed, and, as a consequence of this legislation, it became usual to put a man into possession. The costs of distress levied for payment of small rents were first regulated by the Distress (Costs) Act, 1817, which, by sect. 1, provided, so far as here material:

> No person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of £20 for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take, or receive, out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule . . . and no person . . . shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done.

The material words in the schedule are: "man in possession, 2*s*. 6*d*. per day."

By the Distress (Costs) Act, 1827, these provisions were extended to distress for taxes, rates, tithe, etc., where the sum did not exceed £20, and, finally, by the Law of Distress Amendment Act, 1888, s. 8, it was provided that the Lord Chancellor might from time to time make, alter and revoke rules:

> . . . (2) for regulating the fees, charges, and expenses in and incidental to distresses.

Such rules as concerned distress for rent were made under the Distress for Rent Rules, 1920, and provided by r. 22 that no person should be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto other than those specified in and authorised by the table in appendix 2 to the rules, of which the material one now is scale 2 (2): "for man in possession, 6*s*. per day; to provide his own board in every case."

In *Walker* v. *Retter* (1) it was held by the Divisional Court that these rules (or, rather, those then extant in similar terms) were not *ultra vires*, and no suggestion is now made that that case was wrongly decided. The critical words here are those contained in r. 22, that no person shall be entitled to any fees, charges, or expenses for levying a distress or for doing any act or thing in relation thereto other than those specified in the appendix which I have already quoted.

The legal effect of "walking possession" was discussed in *Lumsden* v. *Burnett* (2) in this court. In that case, the walking possession, as it was there called, was described by A. L. SMITH, L.J., at p. 179, to be a condition:

> when in truth and in fact the man had not been really in possession, but at the most has been in constructive possession of the goods distrained.

As the judge points out, at p. 182:

> . . . where a sheriff goes out of possession and the point arises as to whether he has abandoned possession or not, the question always is one of fact. . . . A sheriff in some circumstances may go out of possession and again re-enter without having abandoned possession, and the question always is whether what he has done amounts to an abandonment of possession.

Dealing with the document there signed, which was ampler in its terms as to the right to re-enter at any time upon the premises—here the matter is compendiously dealt with in the phrase "holding walking possession"—CHITTY, L.J., said, at p. 185:

> Taking into consideration the document, but merely for the limited purpose above stated, and the other undisputed facts relating to the watching of the shop by the defendant's man, and his occasional entrances to see that the goods had not been removed, I say unhesitatingly that possession was not abandoned.

The same view has been taken on the facts of the present case by the county court judge when he refers to this constructive possession as "a method of taking possession." Whether the matter be founded upon the Distress for Rent Rules, 1920, r. 22, which I have cited, by alleging that all the acts of the bailiff were done in relation to levying distress, or whether it be founded upon the language of the Distress (Costs) Act, 1817, s. 1, by alleging that he was doing acts "whatsoever in the course of such distress or for carrying the same into effect," in either case I am of opinion that he cannot be entitled to any charges other than those specified in and authorised by the Distress for Rent Rules, 1920, appendix 2, which has superseded the schedule to the 1817 Act.

That schedule provides, so far as regards matters here material, for a fee for a man in possession only, and, as in this case no man was in possession, no provision is made entitling him to any fee. This view, apart from any question of special agreement, has already been taken by this court in *Lumsden* v. *Burnett* (2), in which it was held that, where goods and chattels are distrained for taxes less in amount than £20, the collector who distrains has no right to the statutory charge for a man in possession unless he has remained in real possession. In that case, the agreement purporting to give a right to walking possession had been signed by the plaintiff's daughter, and it was held by the court that consequently the plaintiff did not agree to the walking possession, nor did he agree to the charges which the alleged agreement purported to authorise, and, it being held that there was no real possession, he succeeded in his action to recover the charge of 2*s.* 6*d.* per day which was then the authorised charge under the Act of 1817. In that case, undoubtedly, there are *obiter dicta* by both the judges that it would have been competent for the plaintiff to have made a special arrangement to pay the 2*s*. 6*d*. *per diem* even though the bailiff did not remain in real possession. A. L. Smith, L.J., says, at p. 185:

> . . . I do not see why such a taxpayer may not agree with a collector, if the former desires neither to pay the tax due nor to suffer the inconvenience of having a man in real possession, to pay the 2*s*. 6*d*. *per diem* to the collector, even though the man does not remain in real possession; but unless such an agreement is made, I am clear that the collector cannot claim the 2*s*. 6*d*. per day if the man does not remain in real possession.

Chitty, L.J., says, at p. 186:

> The statute does not preclude the tenants and persons for whose benefit it was made from contracting themselves out of those benefits. It would often be to the advantage of the person upon whose goods the distress is levied for a sum which he is not prepared to pay at once to get rid of the inconvenience of having the bailiff's man in actual possession; and I can see no valid reason why he should not be at liberty to contract to pay the 2*s*. 6*d*. a day for the man in constructive possession. To hold that he cannot so contract would inflict upon him an unnecessary inconvenience.

These *dicta* have here seriously to be considered, where such an agreement is relied upon.

In *Robson* v. *Biggar* (3) the appellant, who was the landlord, had agreed on a printed form as follows:

> I also consent to your deducting 5 per cent. as commission over and above the statutory costs allowed on the amount recovered.

This she declined to pay, on the ground that, under the Act of 1817 and the Act of 1888, no person should be entitled to any fees for levying distress other than those specified in the Act or rules. Lord Alverstone, L.C.J., and Ridley, J., came to the conclusion—Darling, J., dissenting—that the statute was not concerned with special bargains made between the parties. The judge in the present case felt himself bound by that authority. The particular case to which I have referred, that of *Lumsden* v. *Burnett* (2), was not cited. This decision is, of course, not binding upon us, and the observations of the two members of the Court of Appeal in *Lumsden's* case (2) were made *obiter*, but, now that the matter has been expressly raised in this court, I feel that it must be directly dealt with, giving due consideration to the weighty judgments of the Lords Justices in *Lumsden's* case (2).

In my view, once it is determined that all the acts in the constructive walking possession are acts in the course of the distress or the carrying of it into effect, or acts done in relation to levying distress, it follows that no charges may be made other than those provided in the schedule, and, there being in fact no man in possession within the meaning of that provision, there is no power to charge, but, on the contrary, a direct prohibition. Sect. 2 of the 1817 Act supports this view. That section provides:

> If any person . . . shall . . . take from any person . . . any other or greater . . . charges than are mentioned and set down in the schedule, or make any charge whatsoever for any act . . . mentioned in the schedule, and not really done . . .

—they may apply to the justices of the peace, who may order and adjudge treble the amount of moneys so unlawfully taken to be paid to the complainant by the person so having acted.

In the present case, it would appear that the charge which is made is, if based upon an act mentioned in the schedule—namely, for a man in A possession—a charge for "an act not really done," and the charge is therefore unlawful. The combined effect of sects. 1 and 2 of the 1817 Act and the rules under the Act of 1888 appears to me to amount to a prohibition to charge only for acts mentioned in the sections really done, and there is no power to charge at all for any other act done in making B the distress. As to reliance upon any special agreement, where a prohibition under a statute is absolute, it cannot be waived by the party for whose benefit it is made: *Bisgood* v. *Henderson's Transvaal Estates, Ltd.* (4). If an act be prohibited, it cannot be the subject of a valid contract: *per* BRAMWELL, B., in *Cowan* v. *Milbourn* (5), at p. 236. No C special agreement as to charges for an act of distress, other than those permitted by the legislature or rules, can be made, and the agreement relied upon to justify a charge for walking possession cannot be enforced.

The county court judge, who was of opinion, which I hold to be erroneous, that the parties might make a special agreement to deal with D constructive possession, has, nevertheless, come to the conclusion that the document actually signed by the plaintiff is of no effect, because no amount of charge is mentioned. He adds:

> If I had to consider what is a reasonable fee for a few minutes each day, I certainly do not think that 6*s*. per day would be a reasonable figure.

E In my view of the case, that question does not arise, because, for the reasons I have endeavoured to state, there was no power in the circumstances for the bailiff to make any agreement to charge at all, either under the statute of 1817, or under the rules of 1920, or by any special agreement. For reasons different from those of the judge, I nevertheless F agree with his conclusion, and this appeal will therefore be dismissed with costs.

SCOTT, L.J.: I agree, and I have nothing to add.

G SLESSER, L.J.: CLAUSON, L.J., has authorised me to state that he also agrees.

Appeal dismissed with costs.

Solicitors: *R. H. King & Co.*, agents for *T. W. Walthall & Pritchard*, Birmingham (for the appellant); *Church, Rendell, Bird & Co.*, agents H for *Springthorpe, Holcroft & Bishop*, Birmingham (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

HOSKINS *v.* WOODHAM.

[King's Bench Division (Macnaghten, J.), **February 16, 17, 1938.]**

Sale of Land—Sale by builder of new house—House completed at date of sale—Implied warranty—Fitness for habitation—Bye-laws—Structure of floors on ground floor.

The plaintiff on Mar. 25, 1936, purchased from the defendant, who was developing a building estate, a recently completed house. In the autumn of that year he found that the whole of the ground floor was damp and complained to the defendant. It was found as a fact that the dampness was due to the fact that the joists to which flooring on the ground floor was nailed were embedded in 6 ins. of concrete and flush with the surface thereof. There was thus no air-space between the floor and the concrete, but there was a sheet of prepared felt. The local bye-law required that there should be an air-space, but a proviso allowed the boards to be laid directly on concrete or other similar dry and impervious foundation :—

Held : (i) there is no implied warranty of fitness for human habitation upon a purchase of a new house from a builder, if the house is completed at the time of the contract for sale.

(ii) a floor laid in this way did not comply with the bye-law.

[EDITORIAL NOTE. This case decides a point that might perhaps be thought to be left open by the decision in *Miller* v. *Cannon Hill Estates, Ltd.* (1). It has long been settled that the maxim *caveat emptor* applies to the purchaser of a house that has been occupied for any time. Recent authorities have established that there is an implied warranty in the case of the purchase of a house in the course of erection. The present case deals with the position on the purchase of a new house from the builder, but complete at the time the contract is entered into. The point on the construction of the floor and the building regulation relating thereto is of importance to local authorities and builders.

As to Implied Warranty on Sale of Property, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 297, para. 504 ; and for Cases, see DIGEST, Supp., Sale of Land, Nos. 2922a-2922c.

As to Building Regulations, see HALSBURY, Hailsham Edn., Vol. 26, pp. 335-351, paras. 676-693 ; and for Cases, see DIGEST, Vol. 38, pp. 180-185, Nos. 211-246.]

Cases referred to :

(1) *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113 ; Digest Supp. ; 100 L.J.K.B. 740 ; 144 L.T. 567.

(2) *Perry* v. *Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390 ; Digest Supp.

Action for damages for breach of warranty upon the sale of a house. The plaintiff purchased from the defendant for £695 a house at Enfield, which had been recently erected but was a completed house at the time of the sale. The defendant alleged that there was a breach of the implied warranty that the house was fit for habitation by reason of the ground floor of the house being damp. The construction of floors on the ground floor consisted of 4 ins. of concrete laid over the ground inside the walls of the house. Battens measuring 2 ins. by 2 ins. were placed 2 ft. apart on the top of this concrete. The space between the battens was filled in with concrete, so that the top of the battens was flush with the surface of the concrete. Sheets of prepared felt were then laid down, and then the boards were nailed to the battens. There was thus no air-space between the boards and the concrete.

Gilbert J. Paull for the plaintiff.

H. G. Garland for the defendant.

MACNAGHTEN, J.: This is an action brought by Henry John Hoskins to recover damages from Charles George Woodham in respect of the purchase of a house known as 23, Brookside Gardens, in the urban district of Enfield. The contract of purchase was dated Mar. 11, 1936, and provided that the vendor should sell to the purchaser this house, which was then a completed house, for £695. The purchase was duly completed on Mar. 25, the purchase price being fully paid and the house transferred to the plaintiff, and the plaintiff went into occupation. All went well during the summer of 1936, but when the autumn came, and the autumn rains, an unpleasant odour was noticed on the ground floor—an odour which increased in intensity—and it was ascertained that this was due to the fact that the ground floor was affected with damp. The house is a two-storied house, and the end house of a block of five or six houses. On the ground floor there is a drawing-room in front, a dining-room behind, and behind that again the kitchen, pantry and back entrance. It was found that the whole of the ground floor, according to the evidence of the plaintiff, was affected with this dampness, which not only caused a very unpleasant smell, but, obviously, was also very unhealthy. The plaintiff complained to the defendant, and the defendant's architect came to examine the house. His examination confirmed the view that there was this dampness on the ground floor, but he attributed the dampness, not to any defects in the structure itself, but to the fact that the plaintiff had placed linoleum on the greater part of the ground floor, his theory being that either the water which the charwoman used in her weekly washing of the linoleum, or the condensation of the atmosphere, would result in damp getting through the cracks where the strips of linoleum met and at the margin of the linoleum round the wall.

There has been a great deal of evidence called in this case. The simple question being whether the damp came from above or, as the plaintiff contended, from below, I have no hesitation in saying, after hearing all the evidence on both sides, that this damp undoubtedly came from below.

The construction of the floor consisted of 4 ins. of concrete laid over the ground inside the walls of the house. Battens measuring 2 ins. by 2 ins. were placed 2 ft. apart over the top of these 4 ins. of concrete, and then the space between the battens was filled up with 2 ins. of concrete, and the floor-boards were nailed to the battens by means of ordinary nails. This is said to be a form of construction approved by the proviso of bye-law No. 34 of the urban district council of Enfield. Bye-law 34 provides:

> Every person who shall erect a new domestic building shall so construct the

> whole of the floor in the lowest storey of such building, if such floor be a boarded floor, that there shall be, for the purpose of ventilation between the under side of every joist on which such floor may be laid, and the upper surface of the asphalt or concrete with which such ground is covered, a clear space of 3 ins. at the least in every part, and he shall cause such space to be thoroughly ventilated by means of suitable and sufficient air-bricks, or by some other effectual method.

That is a system of construction which, I think, is popularly supposed to be necessary if one does not want the ground floor to be damp. The proviso is as follows:

> Provided that the foregoing requirement shall not apply to any part of the lowest storey which is provided with a solid floor composed of boards, planks or wood-blocks, laid or bedded directly upon concrete or other similar dry and impervious foundation.

That assumes, apparently, that concrete is both dry and impervious, but, if the evidence on both sides of this case is to be believed, no such concrete has yet been found. In fact, apparently, practical builders, and also the Ministry of Health, know that this proviso, if carried out strictly, would result in a damp floor, and therefore builders put some material which is sold as an impervious material between the concrete and the wood floor, in order to prevent the damp which, according to the evidence given in this case, must necessarily follow if one does that which the proviso to bye-law No. 34 says that one may do. Mr. Paull rightly says that this floor does not comply with the bye-laws, although the building inspector said that it did. I think that Mr. Paull is justified in saying that it did not comply with the bye-law in question, because, instead of being a floor in which the boards are laid on the concrete, it was laid on concrete and battens, which battens were there so that the boards might be nailed down to them. The building inspector for this part of the urban district council of Enfield said that the floor was in accordance with the bye-laws, because it is in accordance with the bye-laws as interpreted, or misinterpreted, by the Ministry of Health, by the district surveyor, and, I understand, by everybody else who is actually engaged in the work of building houses. As I say, the bye-law does not provide for the impervious sheeting or felt or rubberoid, or whatever it is, but all experienced builders know that one must have some material of that sort to avoid having a damp floor with all its consequences.

As I say, I am satisfied that the dampness here in Mr. Hoskins' house came from below, but in this case it is not in the least necessary for me to decide how that dampness came from below. It may have been because the concrete was not good enough; it may have been because the concrete was not thick enough; it may have been because the sheeting, which was supposed to be impervious, was not impervious; it may have been that these battens, which have to be put in if one is going to have a boarded floor, ought not to be there at all; it may be that it was a combination of all those circumstances—that the concrete was bad and insufficient, that the sheeting was also bad and insufficient, and that the battens were not the right sort of battens to use for that purpose, or ought not to have been used at all. It is not necessary

in this case to decide which of these defects caused the dampness, but
that there was a defect, and a grave defect, I have no doubt, and I have
no doubt that the house was not, and is not, reasonably fit for habitation
with a damp ground floor. That is a question of fact, and the only
question of fact which had to be determined in this case.

A When that point has been determined adversely to the defendant,
the question then arises as to whether the plaintiff can maintain this
action. I have already intimated that I do not think he can. It is
quite certain that, in the sale of a completed house, where a sale is duly
executed, and possession taken of the house after conveyance, there is
B no implied warranty that the house is reasonably fit for habitation. Mr.
Paull, for the plaintiff, concedes that that is so, but he says that, when
a new house which is part of a building estate is purchased from the
builder of the house, there is an implied warranty that the house is fit
for habitation. I am not quite clear whether he is inviting me to make
C new law or whether he says that I ought to infer that that has always
been the common law of England, but he does say that it is only in
recent times that people have taken to building houses for sale. It may
be that in Norman times houses were not built for sale, but I should
think that, certainly since the days of Elizabeth—when the agitation
D arose against the monstrous growth of London and all the dangers
that would follow from the extension of London so far even as to the
place where we are now sitting—there have always been persons who
built houses for sale, and certainly throughout the nineteenth century
the speculative builder—which is only another name for the person who
E builds houses for sale, because he builds them on the speculation that
he will be able to sell them—has been a common character, not only in
fiction but also in fact, and, justly or unjustly, I do not say which, has
been subjected to some comment. I am not quite sure, as I say, if Mr.
Paull says that this implied warranty was always part of the common
F law, but has had no opportunity up to the present time of being brought
into actual practice, but certainly there is no such claim which has been
upheld by any court so far as I know. The only case which Mr. Paull
refers me to is *Miller* v. *Cannon Hill Estates, Ltd.* (1), which, so far from
being an authority in his favour, appears to me very clearly to be an
G authority against him. In any case, even if he could extract any comfort
from that case, such comfort could come only from an *obiter dictum* incautiously
uttered by one or other of the judges in that case, because
that was a sale of an uncompleted house, and whatever may have been
said or implied with regard to the sale of a completed house would be
H merely *obiter dicta.*

The case which Mr. Garland referred to, *Perry* v. *Sharon Development
Co., Ltd.* (2), contains the judgments of SIR WILFRID GREENE, M.R.,
ROMER and MACKINNON, L.JJ., and makes it plain that it could not be
argued that, in the case of the sale of a completed house, there was an
implied warranty which could arise. In the particular case we have

under discussion, the matter has certainly been made clearer by the letters to which Mr. Garland has referred. The proposing purchaser asked whether the vendor would give a guarantee, and the vendor replied that he would not, but that, if the purchaser were minded to do so, it was quite open to him, before he entered into the contract, to have the house surveyed by a surveyor on his own behalf. In those circumstances, this action, in my view, fails, and must be dismissed, with the usual consequences.

Action dismissed with costs.

Solicitors: *R. F. Rowland* (for the plaintiff); *Alfred C. Warwick & Co.* (for the defendant).

[*Reported by* J. L. Kirkhope, *Barrister-at-Law.*]

MORGAN & CO. *v.* THOMAS.

[Court of Appeal (Slesser and Scott, L.JJ., and Farwell, J.), **February 15, 16, 1938.**]

Workmen's Compensation—Medical referee's certificate—Certificate ambiguous—Whether any unambiguous part conclusive—Whether judge bound to send certificate back for explanation—Workmen's Compensation Act, 1925 (c. 84), *s.* 19.

The applicants, who had been paying the respondent compensation in respect of an injury, applied for a medical reference. The medical referee granted a certificate which was ambiguous:—

Held: (i) a judge, although he has power to do so, is under no duty to remit an ambiguous certificate to the medical referee for explanation.

(ii) if a certificate is ambiguous, it is wholly bad, and even an unambiguous portion cannot be conclusive evidence of matters certified therein.

[EDITORIAL NOTE. It was argued in the present case that the county court judge was under a duty to send back an ambiguous certificate to the medical referee. No doubt, for the convenience of all parties, it is generally preferable that the matter should be cleared up by a reference back to the referee (see *Towler* v. *British Dye Stuffs Corpn.* (*Blackley*), *Ltd.* (1921), 14 B.W.C.C. 34), but, if that is not done, the ambiguous certificate is a nullity and cannot be relied upon as conclusive of some matter certified therein as to which it is unambiguous.

As to Certificate of Medical Referee, see HALSBURY, 1st Edn., Vol. 20, p. 183, para. 394; and for Cases, see DIGEST, Vol. 34, pp. 376-378, Nos. 3051-3062. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 424-428.]

Case referred to:

(1) *Austin* v. *Partington Steel & Iron Co., Ltd.* (1928), 21 B.W.C.C. 1; Digest Supp.

Appeal from a decision of His Honour Judge L. C. Thomas at the Cardiff County Court, dated Nov. 16, 1937. The facts and the arguments in the case are set out in the judgments.

Carey Evans for the appellants.

Joshua Davies for the respondent.

SLESSER, L.J.: In this case, a man named Evan John Thomas suffered injury by accident, and on July 8, 1936, an award was recorded in his favour for a weekly payment payable as compensation in respect of that accident, which occurred on May 29, 1934, at the rate of 15*s.* a week. That payment was duly made for a period, and then there arose questions as to whether the man had sufficiently recovered from the incapacity then found to justify diminution or termination of the award. The matter proceeded through the usual channels under sect. 19 (2) of the Act, and finally the matter came before Mr. Harries, the medical referee, who gave a certificate on Apr. 22, 1937, in regard to the man's condition, the order being that the matter be referred:

> to a medical referee for his certificate as to the condition of the said Evan John Thomas and his fitness for employment, specifying if necessary the kind of work for which he is now fit and as to whether, or to what extent the incapacity, if any, of the said Evan John Thomas is due to the accident.

That order was obtained on Apr. 13, 1937, and on Apr. 22, 1937, the medical referee gave his certificate, in which he said:

> The condition of the said Evan John Thomas is as follows: There is now no limitation of movement at the right shoulder joint. There is slight limitation at the right elbow. This was not present at my last examination (24/8/1935). This is due to the osteo-arthritis shown to be present in the report of Sir A. Woodall, who X-rayed the joints of this limb. There is a soft creaking in the right shoulder; none in the left. X-ray examination by Sir A. Woodall showed no osteo-arthritis in the shoulder. I think the man should try his old work. There is no evidence that the arthritis in the left elbow has been caused by the accident. Any disability in the shoulder is due to the accident, but this disability is slight; in fact, none can be shown to be present. The man states he has pain if he works. He may be correct; there is no method of proving or disproving this.

On the matter coming before the county court judge on an application by the employers for a review, it was, of course, incumbent upon them, the employers, to show that there had been some change of circumstance justifying a diminution or termination of the award. That they sought to show by producing the certificate, which Mr. Carey Evans quite rightly says is conclusive as to the matters so certified by it. The point was taken on behalf of the workman that, in this particular case, either the certificate was so ambiguous as not to be conclusive of anything, or, if it were conclusive of any matter at all, it was not conclusive of any matter which would justify the employers in saying that it supported the contention that they were entitled to a diminution or termination of the award on the ground of change of circumstance.

The first question which had to be considered by the county court judge was as to what would be the effect if he were to come to the conclusion, construing *this* document, that the argument on behalf of the workman was right, and that the certificate as a whole was ambiguous, and really did not conclude anything. Then, secondly, he had to consider what would be the effect if the certificate were conclusive, as was contended for by the employers, as to the matters of which it certified. As I read his judgment, he dealt with the matter upon both of those assumptions, and has, for different reasons, perhaps, come to a conclusion in favour of the workman on either view. The question before this court is whether he was right in his judgment. The first matter one has to consider, I think, is the certificate itself, and in doing so one has to bear in mind the questions which were asked the medical referee, and to see how he has answered them. The essential question was this: Was this man still partially incapacitated, or was he fit for his old work? A The medical referee was asked to give his certificate "as to the condition of the said Evan John Thomas and his fitness for employment." He has undoubtedly excluded from any consideration of the matter the condition of the man's right elbow, but he has said that the disability in the shoulder is due to the accident. On the question of the construing of B *this* document—(it is a question of law as to the meaning of it)—it does appear that the medical referee has found, in my opinion, that there is a slight disability, because he says:

> Any disability in the shoulder is due to the accident, but this disability is slight. C

That is a positive finding; but then he qualifies that by saying: "in fact, none can be shown to be present." I have great difficulty myself in understanding what the effect of that statement and the qualification taken together may be. He then continues: "The man states he has pain if he works." I think that that pain is probably referable to the D question of the shoulder, because he has already excluded the elbow from having any relevance to the matter. Therefore it would not be material, so far as the elbow is concerned, to inquire for this purpose whether or not there was pain there. That matter again is left in some doubt. Then he says: "He may be correct; there is no method of E proving or disproving this." That is a finding that the man may have some pain and disability in the shoulder if he works, but, instead of saying: "The man is fit for light work," having said: "There is no limitation of movement at the right shoulder joint," he says: "I think the man should try his old work." I do not read that as being a finding F that the man is fit for it, but that he may experimentally go back to work in order to see what the result of so doing may be. I think that, if he had meant to say that the man suffered from no disability at all, he would not have put the matter in that way, but would have answered the question which he was asked to the effect that the man was fit for G his old work.

The burden of proof that there has been a change of circumstance in this case is upon the employer. The employer's case is that this man is no longer partially incapacitated, but that he has wholly recovered, and he produces a certificate which, on any view, to my mind, establishes H no such proposition. In those circumstances, it might well have been that, without any evidence being called at all on behalf of the workman, the county court judge said: "This certificate does not show [as it was sought to show] that this man has recovered [which was the point at issue between the parties], and therefore I will make no order on the matter, the employers having failed to discharge the onus upon them of showing that there has been a change of circumstance." That, I think, is the meaning of the county court judge's statement that he was content to rest his decision :

> on the assumption that the medical referee's report was conclusive and that in effect
> A he had not certified that the workman was fit to do his work as a coal-trimmer.

That would be the end of the case, and I think that it would be justified by the certificate which I have endeavoured to construe, but the county court judge says alternatively : "I assume that this certificate is really ambiguous, and, as the law provides that the certificate should prove
B that which it certifies, this certificate in effect certifies nothing." I disagree with Mr. Carey Evans when he says that one can find this certificate to be good in parts. If the certificate is ambiguous, I do not think that it would be right to dissect it and say that one part of it is conclusive and that another part of it is not. I think it is clear that, if
C this be a certificate which really does not certify the matters which had to be considered at all, and if, as I say, that is a view which is not necessarily that upon which the county court judge based his judgment, then, in my opinion, if that be the right view, I think that the principles of the Act, and such authority as there is in regard to the matter, establish
D the view that there is no duty upon the county court judge to remit the matter for an explanation of ambiguities and uncertainties. There is no doubt at all that County Court judges, this court and the House of Lords have properly at different times sent back matters to medical referees for explanation, but what is here contended, on
E the view that the certificate is ambiguous, is that he is under a duty so to do, and not that he has power so to do. I can find no such duty imposed upon him. The power to send a matter to a medical referee under sect. 19 is entirely at the option of the parties. There are, of course, cases where one party may insist on a reference,
F and there are cases where the parties may join in a reference. It is not necessary to consider the machinery of sect. 19. Suffice it to say that it is to be put in motion entirely at the option of one or both of the parties. There is no necessity to employ sect. 19 at all, but, if sect. 19 be employed, and if a certificate be obtained, it is conclusive of the matter
G which it certifies, and to that extent saves, as it was no doubt intended to save, a good deal of expense and trouble in calling evidence on the matter referred. If, however, a particular certificate does not so certify, or is for one reason or another not available to the party who proffers it as evidence, the only effect of that is that that piece of evidence,
H which cannot be challenged if it be relevant and admissible and intelligible, cannot be used. The county court judge, just as he may have evidence before him on any matter not covered by the certificate, may have evidence before him on matters with which the certificate purports to deal, but with which it fails to deal. I can see nothing in the Act which prevents the county court judge, if there is tendered to him an inadequate

or meaningless certificate, from proceeding exactly as he would in a case where sect. 19 had never been invoked at all. That seems to be the principle to be followed, and it is, as I see it, the view I myself should have formed if there had been no authority on the matter, and entirely consistent with the case of *Austin* v. *Partington Steel & Iron Co., Ltd.* (1). In that case, the medical referee certified that a man was : A

> fit to resume his ordinary occupation, but described it as being something different from what in fact it had previously been. The county court judge refused to treat the certificate as conclusive and received evidence as to the nature of the respective occupations. . .

In that case, the parties were invited to agree that the matter should B go back to the medical referee, but they objected to that. This, however, seems to me not to affect the point at all, and equally the county court judge himself preferred to proceed with the reference, and did not consult the parties on the matter. I think that the same principles would apply both ways as to that. In that case, it was held that the certificate, being C ambiguous, was not conclusive, and, the parties having refused the opportunity of having the ambiguity explained by the medical referee, the judge was entitled to hear the evidence tendered, and to act upon it. I do not read that case as turning upon the point that the parties had been invited, but had declined, to send the matter back to the referee. D If Mr. Carey Evans' view was right, I should have imagined that the judge, on his view, would be bound to send it back, whether or not the parties agreed. It is a matter, I think, of a general principle. LORD HANWORTH, M.R., after having dealt with the facts, said in that case, at p. 6 : E

> I think, therefore, that the county court judge was quite right in allowing evidence to be given to explain the ambiguity and in not holding to the certificate as it stood. Then it is said that if he were in any doubt the county court judge should have sent the matter back to the medical referee. He appears to have taken steps for that, because he says in his notes : "I have suggested that the matter should go back to the medical referee, but that offer has not been accepted." I think that F means that he suggested that the matter should be sent back to obtain a clearer certificate but that the parties themselves were not willing to do that, but wanted a decision on the certificate as it stood.

I think that, although that case was decided on its particular facts, there is nothing there to suggest that the decision would have been otherwise G if the judge himself, without consulting the parties, had gone on with the case. I do not think that it is due to any consent, or absence of consent, by the parties. Mr. Carey Evans in this case says that there was a duty on the county court judge to send the matter back to the medical referee, but I do not think that that is so, and I see that ATKIN, L.J., H in *Austin's* case (1), says, at p. 7 :

> I think that the county court judge was perfectly entitled to receive evidence to see what the work of a foreman loader was.

For those reasons, I am of opinion that this appeal fails, and should be dismissed with costs.

SCOTT, L.J.: I agree. Under sect. 19 (2) of the Act, there is no provision which deprives the county court judge of what I may call the general seisin of the case, and I think that, had it been intended to impose upon the judge a mandatory obligation to send a certificate back to a medical referee where he found it ambiguous, or not sufficient to cover the whole ground of the questions asked, the language of sect. 19 (2) would have been different. I think, therefore, that it follows that, if the county court judge thought that this certificate failed to comply with the direction of the registrar and failed to give an adequate answer to the questions asked by him, he was free to hear evidence, as was decided in the case to which SLESSER, L.J., has just referred. Conversely, it was open to him to read the certificate, and, if he thought, as an alternative, that the certificate, fairly read, did find partial incapacity as continuing, he was free to act upon that view. He says in his judgment that he took the evidence, as it were, *de bene esse*, and, in my view, on either alternative, his conclusion was justified—on the alternative that he was entitled to ignore the certificate altogether and hear evidence, or on the alternative that it was open to him to reject the evidence, and not to take that into account at all, but to interpret the certificate, and find in it a sufficiently clear intimation of a finding by the referee that the partial incapacity was continuing. Whichever view one takes of it, it results in this appeal being dismissed.

FARWELL, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Botterell & Roche*, agents for *Llewellyn & Hann*, Cardiff (for the appellant); *Kinch & Richardson*, agents for *Allen Pratt & Geldard*, Cardiff (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

DE BUEGER *v.* J. BALLANTYNE & CO., LTD.

[PRIVY COUNCIL (Lord Wright, Lord Romer, Sir Lancelot Sanderson, Sir Sidney Rowlatt, Sir George Rankin), **January 31, February 14, 1938.**]

Privy Council—New Zealand—Money—Currency—Contract of service made in England to be performed in New Zealand—Payment in "sterling"—Whether English or New Zealand currency.

Under an agreement made in London between the appellant and the respondent company, the appellant proceeded to New Zealand, there to be employed by the respondents as a tailor-cutter for a period of three years at a salary of £700 sterling per annum. At the date of the agreement the value of the New Zealand pound was at about 10 per cent. discount as compared with the English pound, and later this discrepancy rose to about 25 per cent. The appellant claimed to be paid the agreed salary "in such sums of New Zealand currency as should be the equivalent at the time of each payment of the same amount in sterling." The respondent company refused to pay the £700 otherwise than in New Zealand currency:—

HELD: the word "sterling" was added in the agreement in order to define what means of discharge—that is, what currency—was being stipulated. The necessity for adding the word was simply because the "unit of account," the word "pound" or symbol £, is the same both in England and in New Zealand. The *prima facie* rule, according to which New Zealand pounds would be meant, as being the currency of the place of payment, was excluded by the use of the word "sterling," and the appellant's contention was the correct one.

Judgment of the Court of Appeal of New Zealand ([1936] N.Z.L.R. 511) *reversed, and the judgment of the Supreme Court of New Zealand* ([1935] N.Z.L.R. 1043) *restored.*

[**EDITORIAL NOTE.** *Prima facie* payment has to be made in the currency of the place of payment, but this presumption is rebutted here by the use of the word "sterling," which is held to denote payment in English currency.

AS TO CURRENCY IN WHICH PAYMENT MADE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 173, 174, para. 251; and FOR CASES, see DIGEST, Supp., Money and Moneylending Nos. 15a-61a.]

Cases referred to:

(1) *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122; Digest Supp.; 103 L.J.Ch. 85; 150 L.T. 281.

(2) *Payne* v. *Deputy Federal Commissioner of Taxation*, [1936] A.C. 497; [1936] 2 All E.R. 793; Digest Supp.; 105 L.J.P.C. 98; 155 L.T. 309.

(3) *Auckland City Council* v. *Alliance Assurance Co., Ltd.*, [1937] A.C. 587; [1937] 1 All E.R. 645; Digest Supp.; 106 L.J.P.C. 40; 156 L.T. 367.

(4) *Westralian Farmers, Ltd.* v. *King Line, Ltd.* (1932), 43 Ll. L. R. 378; Digest Supp.

(5) *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589; 12 Digest 392, *3201*; 53 L.J.Q.B. 156; 50 L.T. 194.

(6) *Saunders* v. *Drake* (1742), 2 Atk. 465; 35 Digest 172, *28*.

(7) *Scott* v. *Bevan* (1831), 2 B. & Ad. 78; 35 Digest 174, *44*; 9 L.J.O.S.K.B. 152.

(8) *Broken Hill Proprietary Co., Ltd.* v. *Latham*, [1933] Ch. 373; Digest Supp.; 102 L.J.Ch. 163; 148 L.T. 412.

(9) *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society, Ltd.*, [1937] 4 All E.R. 206; Digest Supp.; 107 L.J.P.C. 5; 157, L.T. 522.

(10) *Case of Mixed Money* (1605), 2 State Tr. 113; 11 Digest 557, *570*.

APPEAL from a majority judgment of the Court of Appeal of New Zealand (OSTLER, BLAIR and KENNEDY, JJ., REED, A.C.J., dissenting), dated June 10, 1936, allowing an appeal from a judgment of the Supreme Court of New Zealand (NORTHCROFT, J.), dated Nov. 13, 1935. The facts of the case are contained in the judgment of their Lordships delivered by LORD WRIGHT.

J. D. Casswell and *A. Lloyd* for the appellant.

Alexander Ross and *Paul Tyrie* for the respondent company.

Casswell: The word "sterling" in the agreement of Aug. 2, 1932, between the respondent company and the appellant, means British currency. The general rule that monetary obligations are effectually discharged by payment of that which is legal tender in the *locus solutionis* applies only when there is nothing to take the case out of the general rule, and the use of the word "sterling" by the parties to the agreement

takes this case out of the general rule. The agreement related to a commercial transaction, and is to be interpreted according to the law of the contract, which is the law by which the parties intended to be governed, such intention to be ascertained from the contract itself and its language. The surrounding circumstances were such that the parties
A must be assumed to have intended that the word "sterling" should bear the same meaning in which that word then was, and now is, used in England. In England, the word has, and had at the time of the making of the agreement, the well-known meaning of "British currency," as distinguished from the currency of other countries. The contention
B that the respondent company's obligation could be discharged by payment in New Zealand currency deprives the word "sterling" of all meaning. In this agreement, the word was intended to define the measure, and not the mode, of payment. [Counsel was stopped by the court.] [Counsel referred to *Auckland City Council* v. *Alliance Assurance*
C *Co., Ltd.* (3), *Jacobs* v. *Crédit Lyonnais* (5), *Saunders* v. *Drake* (6), *Scott* v. *Bevan* (7), *Broken Hill Proprietary Co., Ltd.* v. *Latham* (8).]

Ross: Under cl. 4 of the agreement, the appellant's employment as tailor-cutter was to be subject to the usual provisions of employment of that nature adopted by the respondent company in New Zealand. The
D "pound sterling" means the unit of account or money of account common to England and New Zealand, and these words were used in the memorandum of agreement to mean the pound as a unit of account. The obligation expressed in "pounds sterling" in it was fully discharged by payment to the appellant by the respondents of £700 per annum in
E New Zealand currency. It was not the intention of the parties at the date of entering into the agreement that any question of rates of exchange should arise. The proper law of the contract is New Zealand law. [Counsel referred to *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society, Ltd.* (9), *Adelaide*
F *Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (1), *Case of Mixed Money* (10).]

Casswell in reply.

LORD WRIGHT: This appeal raises a short but interesting question
G of the construction of an agreement about which the decisions in the courts of New Zealand have exhibited differences of opinion. The agreement was made in London on Aug. 2, 1932, between the respondents, described as "a company incorporated in New Zealand, whose London office is at 117, Wool Exchange, Basinghall Street, in the city of London,"
H and the appellant, described as "Charles Francis Martin de Bueger, of 139, Albany Street, Regent's Park, in the county of London." Under the agreement, the appellant was to proceed to New Zealand, there to be employed by the respondents as a tailor-cutter for a period of three years from his arrival at a remuneration of £700 sterling per annum. The sole question is whether the appellant is entitled under that agreement

to be paid according to the English or according to the New Zealand value of the pound. At the date of the agreement, the latter was at about 10 per cent. discount as compared with the former, and later during the period of the service the discrepancy rose to 24 per cent. or 25 per cent. A special case was submitted to the court. It states that the appellant had always consistently claimed to be paid the agreed salary " in such sums of New Zealand currency as should be the equivalent at the time of each payment of the same amount in sterling," and that the respondents had refused to pay the £700 otherwise than in New Zealand currency. The case stated three questions for the opinion of the court, of which the answer to the first is decisive of the dispute. It is :

> (i) Was the plaintiff [appellant] entitled to be paid the agreed salary in such amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange current at the time of each payment ?

No point is raised on the phrasing of this question which might seem to suggest the answer. Question 2 is whether, if the appellant is right in his claim, the deficiency on each periodical payment carries interest. This is not now disputed. Question 3 is whether the payments actually made in New Zealand currency of £700 were a full discharge of the agreed salary. The answer to that question obviously must follow the answer which is given to the first question.

Northcroft, J., in the Supreme Court, decided in favour of the appellant. He held in effect that the question was purely one of construction of this particular contract. The use of the word " sterling " could not, in his opinion, be regarded as a mere habit of speech not meaning anything more than legal tender. In this contract, he thought that the word must be construed as signifying English currency in contrast with currency of other countries, and in particular with that of Australia or New Zealand. He referred to recent cases in which this contrast between sterling and other currency was plainly recognised.

In the Court of Appeal, that decision was reversed by a majority. Reed, A.C.J., who dissented, held that, in the absence of the word " sterling," the salary would have been payable in New Zealand currency, because it was the currency of the place of performance ; but the use of the word " sterling," which was not common form in a contract of service, in a commercial contract drawn and executed in London, must, in his opinion, be taken to express " the intentions of the parties as to the currency in which the remuneration should be paid." He held that " sterling " here meant British currency, and was in constant use in that sense.

Ostler, J., as also Kennedy, J., with whose judgment Blair, J., agreed, took the opposite view. Ostler, J., held that, as in Aug., 1932, the New Zealand pound was only at a discount of 10 per cent., and was not depreciated to 25 per cent. until Jan., 1933, the appellant was not likely to have exchange questions in his mind, and, if he had, should have insisted on language less ambiguous than the word "sterling," which he said was used both in England and in New Zealand as meaning the currency which has now taken the place of gold as legal tender. He would have come to a different conclusion if the New Zealand pound had been a different unit of account when the contract was made, but held that it followed from *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.* (1) that the English and New Zealand pound were the same, and hence that payment in New Zealand currency was a sufficient performance, since in New Zealand the word "sterling," at least until the Reserve Bank of New Zealand Act, 1933, meant nothing more than paper money, which had taken the place, since Aug., 1914, of the sovereign as legal tender. KENNEDY, J., also emphasises as the ground of his decision that:

> The English pound or the pound sterling, as the unit of account, is not only identical with the English pound used in England for so many years, but it is also one and the same as the New Zealand pound.

He held that:

> The pound in New Zealand is the same unit of account as the pound in England, not merely a unit of account with the same name . . . the obligation to be discharged by payment in New Zealand is expressed in a money of account common to New Zealand and to England and will be discharged by tender of that which is legal tender at the place of performance.

Thus in his judgment the word "sterling" adds nothing. It merely, he adds, "emphasises what is already clear, that the money of account is English." He seems to use interchangeably unit of account and money of account, though the former should refer to a denomination and the latter to a currency.

Their Lordships, with the greatest respect, find themselves unable to agree with the majority of the Court of Appeal. It is important to realise what the *Adelaide* case (1) actually decided. The decision was that a sum in "pounds," payable under a contract made in England but payable in Australia, was payable, not in sterling, but in Australian currency. The difference in money value was very substantial, so that to a practical mind it would seem wrong to say that the English pound and the Australian pound were the same. They were identical only in name and as a matter of words, though up to 1914 they had been the same both in name and in fact, both being linked to gold, and based on the same gold coin, the sovereign. This identity in words, combined with practical difference in value, was expressed by LORD WARRINGTON OF CLYFFE in the *Adelaide* case (1), at p. 138, where he said:

> I have come to the conclusion that, merely as a unit of account, the pound symbolised by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged.

It was just this difference in the "means" of discharging the obligation—that is, the actual currency—which was the essence of the case.

This practical difference was again emphasised in *Payne* v. *Deputy*

Federal Commissioner of Taxation (2), where an Australian taxpayer was objecting to converting income, received in English sterling, and left in England, into Australian currency when making his tax returns. The figure of income, if so converted, was substantially higher than it would have been if he could have brought in his sterling income at its face amount. It was held that he was bound to convert the English pounds A into Australian pounds. The name of the measure of the obligation might be identical, but the measure of the value connoted, or of the means of discharging it, was different.

It is clear that, under a contract like that in question, what matters to the parties is the means (that is, the currency) in which the obligation B is to be discharged. In their Lordships' judgment, the word "sterling" was added in the agreement in order to define what means of discharge —that is, what currency—was being stipulated. The necessity for adding the word was simply because the "unit of account," the word "pound" or symbol £, is the same both in England and in New Zealand. C If the word "sterling" had not been inserted, the salary would have been payable in New Zealand currency, that being the place of payment, on the principles laid down in the *Adelaide* case (1). The effect of that decision was recently summarised by this Board in *Auckland City Council* v. *Alliance Assurance Co., Ltd.* (3), at p. 604: D

> It is quite clear that the whole problem [in that case] arose because of the divergence in value of the two currencies, and it was solved, as a question of construction, by determining what currency, on the true construction of the contract, was connoted by the use of the word "pound." It was held that in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated that payment was to be made was the currency meant. Contracts are expressed in terms of the unit of E account, but the unit of account is only a denomination connoting the appropriate currency.

In the agreement here in question, the word "sterling," in their Lordships' judgment, is an express term, intended to exclude, and in fact excluding, the *prima facie* rule according to which New Zealand pounds F would be meant, as being the currency of the place of payment. It is impossible, in their judgment, to regard the word as indicating simply legal tender at the place of payment, New Zealand. The agreement is clearly on its face a formal and studied document. It is drawn up and executed in London between the respondents' London house and the G appellant, a London resident. The insertion of the word "sterling" is not common form in a service agreement like this. If it is used in any business document in London, it naturally means "British sterling" and nothing else. It is used in this sense habitually in exchange quotations and in documents dealing with international transactions, in which H it is necessary to define the currency intended, including transactions with the Dominions. The contrast between sterling (*sc.*, British sterling or currency) and Dominion or Colonial currency is familiar. The contrasted use of these terms is to be found in seventeenth and eighteenth century authorities, of which some are cited in the *Adelaide* case (1), at

p. 153. The contrast between sterling and other currency is also illustrated in *Westralian Farmers, Ltd.* v. *King Line, Ltd.* (4), where the charterparty distinguished between British sterling and Australian currency, and also *passim* in recent judgments in this country, such as the *Adelaide* case (1) and the *Auckland* case (3). Having regard to the A place where, and the parties between whom, this contract was made, their Lordships are satisfied that the appellant's claim is well-founded. It is not to be forgotten that in Aug., 1932, exchange questions were matters of business moment. The appellant, who was going to New Zealand, might naturally desire to be assured that he would be paid in B the currency with which he was familiar.

Their Lordships do not desire to express any opinion on the question as to whether the construction of the agreement would have been the same if it had been made and entered into in New Zealand. On this question, eminent judges in New Zealand seem to differ, and their Lord- C ships need not decide it on this occasion. It would not, however, in their Lordships' judgment, be right to attribute to the appellant, or indeed to the respondents' London house, or to those who drafted the agreement, any familiarity with the law and practice of New Zealand in matters of currency, or any intention to import that law or practice, D whatever it might be, into the agreement, which was obviously drafted with the idea of eliminating any doubt or dispute that the appellant would be paid the same amount of salary as if he were working in England. For these reasons, their Lordships are of opinion that the appeal should be allowed and the judgment of NORTHCROFT, J., restored. E If the parties are unable to agree on the sum to which the appellant is entitled, there must be an order for a reference to the Supreme Court to fix it. The appellant will have his costs of this appeal and his costs in the courts below. Their Lordships will humbly so advise His Majesty.

Appeal allowed with costs.

F Solicitors: *Lloyd & Lloyd* (for the appellant); *Wray, Smith & Halford* (for the respondent company).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

G

Re ASHTON'S ESTATE, WESTMINSTER BANK, LTD. *v.* FARLEY.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson, L.J., and Farwell, J.), **February 21, 22, 1938.**]

H *Charities—Charitable purposes—Gift to vicar and churchwardens for parish work.*

By her will a testatrix gave part of her residuary estate to the vicar and churchwardens of certain churches "for parish work":—

HELD [CLAUSON, L.J., dissenting]: this was not a charitable gift, and accordingly it failed.

Decision of Luxmoore, J. ([1937] 3 All E.R. 279), *affirmed.*

[EDITORIAL NOTE. The previous authorities had suggested that a gift for the purposes of the parish as distinct from those of the church might not be charitable as including objects not charitable in law, and that view is here adopted.

AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to:

(1) *Dunne* v. *Byrne*, [1912] A.C. 407; 8 Digest 294, *718*; 81 L.J.P.C. 202; 106 L.T. 394.

(2) *Re Davidson, Minty* v. *Bourne*, [1909] 1 Ch. 567; 8 Digest 296, *735*; 78 L.J.Ch. 437; 99 L.T. 222.

(3) *Re Bain, Public Trustee* v. *Ross*, [1930] 1 Ch. 224; Digest Supp.; 99 L.J.Ch. 171; 142 L.T. 344.

(4) *Re Stratton, Knapman* v. *A.-G.*, [1931] 1 Ch. 197; Digest Supp.; 100 L.J.Ch. 62; 144 L.T. 169; *affg.* S.C. *sub nom. Re Stratton, Stratton* v. *A.-G.*, [1930] 2 Ch. 151.

(5) *Re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382; 8 Digest 294, *716*; 76 L.J.Ch. 240; 96 L.T. 357.

(6) *Thornber* v. *Wilson* (1855), 3 Drew. 245; 8 Digest 317, *986*; 24 L.J.Ch. 667; 25 L.T.O.S. 309; *subsequent proceedings* (1858), 4 Drew. 350.

(7) *Re Delany, Conoley* v. *Quick*, [1902] 2 Ch. 642; 8 Digest 245, *50*; 71 L.J.Ch. 811; 87 L.T. 46.

(8) *West* v. *Knight* (1669), 1 Cas. in Ch. 134; 8 Digest 255, *163*.

(9) *Re Lopes, Bence-Jones* v. *Zoological Society of London*, [1931] 2 Ch. 130; Digest Supp.; 100 L.J. Ch. 295; 146 L.T. 8.

(10) *Hunter* v. *A.-G.*, [1899] A.C. 309; 8 Digest 254, *157*; 68 L.J. Ch. 449; 80 L.T. 732; *revsg.* S.C., [1897] 2 Ch. 105.

(11) *Re Knox, Fleming* v. *Carmichael*, [1936] 3 All E.R. 623; Digest Supp.

(12) *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] 1 Ch. 557; Digest Supp.; 98 L.J. Ch. 261; 140 L.T. 659; *varied on appeal, sub nom. A.-G.* v. *Plowden*, [1931] W.N. 89.

(13) *Re Jackson, Midland Bank Executor & Trustee Co., Ltd.* v. *Wales Archbp. of* [1930] 2 Ch. 389; Digest Supp.; 99 L.J. Ch. 450; 144 L.T. 102.

(14) *Re Davies, Lloyds Bank, Ltd.* v. *Mostyn* (1932), 48 T.L.R. 539; Digest Supp.: *affd.*, 49 T.L.R. 5.

APPEAL from an order of LUXMOORE, J., dated June 8, 1937, and reported in [1937] 3 All E.R. 279. The facts are set out in the judgments.

H. B. Vaisey, K.C., and *W. S. Wigglesworth* for the appellants.

J. B. Richardson for the Westminster Bank, Ltd.

Charles Harman, K.C., and *T. R. C. Goff* for the next-of-kin.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *A. Andrewes Uthwatt* for the Attorney-General.

Vaisey, K.C.: It is clear upon the construction of the will that the testatrix intended to give this money to the vicar and churchwardens in their official capacity for parish work. [Counsel referred to *Re Bain, Public Trustee* v. *Ross* (3) and *Re Stratton, Knapman* v. *A.-G.* (4).] The testatrix has confined this gift to those purposes for which the vicar and churchwardens exist—that is to say, ecclesiastical purposes within their respective parishes. In each case, these are not ancient civil parishes, but parishes for ecclesiastical purposes only, and therefore "parish work" means "ecclesiastical parish work." "Parish work" is the work within the ambit of the parish which the vicar and churchwardens are bound to perform as part of their ecclesiastical work. [Counsel referred to *West* v. *Knight* (8), *Re Garrard, Gordon* v. *Craigie* (5), *Re Lopes, Bence-Jones* v. *Zoological Society of London* (9), *Hunter* v. *A.-G.* (10).] *Re Knox* (11) lays it down that, when one finds a gift associated with another charitable gift, there is some presumption that the former is also charitable.

Harman, K.C.: The vicar and churchwardens are merely trustees, merely the hands to receive the bounty of the testator. The fact that they bear an ecclesiastical character has nothing to do with the case. There is nothing here to confine the gift to charity as the law understands it. The real test is whether the court could have a proper control over the administration of this fund in the hands of the vicar and churchwardens, and could keep it restricted to purposes charitable in law. There is no difference between " parish work " and " parochial purposes." The building of a boys' club would be parish work, but would not be charitable within the meaning of the law. [Counsel referred to *Re Davidson, Minty* v. *Bourne* (2), *Dunne* v. *Byrne* (1), *Re Grove-Grady, Plowden* v. *Lawrence* (12), *Re Bain, Public Trustee* v. *Ross* (3), *Re Stratton, Knapman* v. *A.-G.* (4).] In *Re Jackson* (13), there was a gift to the Archbishop of the Church in Wales for " work in the church," and this was held to be bad. In *Re Davies* (14), there was a gift also to an archbishop for " work connected with the Roman Catholic church," and that also was held to be bad.

Vaisey, K.C., in reply: The words of the gift designate mere machinery by which the charitable object is to be carried out.

SIR WILFRID GREENE, M.R.: I should be happy if I could find my way to decide this appeal in a way different from that in which it was decided by the judge, but I do not find myself able, consistently with well-known principles and with what I conceive to be the true construction of the gifts in question, to take that course. Ordinarily, I should have been content to say that I agreed with the judgment of the judge for the reasons which he gave, but, in view of the fact that the members of the court are not in unanimity as to the decision in this case, and in deference to the able argument which we have heard, I will express my opinion in my own language.

The gifts in question are two gifts contained in the will of Miss Emma Mary Ashton in the following language:

> I give and appoint [then she describes her residue with a trust for sale and she directs the trustees to stand possessed of the residue] upon trust in equal shares for St. Clement's Mission, Notting Dale . . . for their mission work, the Society for the Propagation of the Gospel in Foreign Parts, to the vicar and churchwardens of St. Columba's Church, Hoxton, for parish work, and the vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens, Kensington, for parish work.

It is with the last two gifts that we are concerned. The value of them, we are told, is something like £12,000 each.

The principles applicable to this class of question are not, I think, susceptible of dispute. If, upon the true construction of this gift, it would be competent to the trustees named to apply portions of the trust property for purposes which are not charitable, the trust would be bad. If, on the other hand, according to the true construction of the gift, the powers of the trustees to apply the funds would be limited to charitable purposes, the gift would be good.

In the present case, Luxmoore, J., has held that the purpose named for which the gift is applicable—namely, for parish work—is such as to include, as a matter of construction, activities which are not charitable in the legal sense. It is argued by Mr. Vaisey, with, if he will allow me to say so, great ability, that the words " for parish work," when taken in conjunction with the character and offices of the trustees—namely, the vicar and churchwardens—must be read in a limited sense, and must be limited to ecclesiastical purposes falling within the functions which the vicar, with the assistance and support of the churchwardens, is bound to perform.

There is one argument with which I will deal quite shortly in order to get it out of the way, and that is this. These two parishes are both new parishes, and the parish, in each case, exists for ecclesiastical purposes only, and not for any civil purposes. It is suggested that that circumstance has some bearing when taken in connection with the words that are used, because it is said that, the nature of the parishes being what I have stated, the duties of the vicar and churchwardens are, of course, purely ecclesiastical, and that the object of the parish is an ecclesiastical object, and nothing else. I am unable myself to attach any importance to the fact that these are new parishes. It seems to me that the words " parish work " must be construed without reference to that circumstance at all. I cannot bring myself to believe that that external fact was one which the testatrix here had in contemplation, and it would be a very curious result if precisely similar words had one result in the case of an old parish and a totally different result in the case of a new one. I therefore put that argument on one side.

I quite agree that, if the words could be construed in the way in which Mr. Vaisey would have us construe them, he would be entitled to succeed, but I find myself quite unable to construe them in that way. First of all, I do not think that it is legitimate to cut down the purposes which are specified by reference to the character of the trustees. That is a rule that has been enunciated more than once. The passage in which it is most frequently quoted is the passage in the judgment of the Privy Council in *Dunne* v. *Byrne* (1), delivered by Lord Macnaghten, at p. 410:

A similar argument was advanced and rejected in the Court of Appeal in England in the case of *Re Davidson, Minty* v. *Bourne* (2). It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.

I quite agree that Lord Macnaghten is there referring to a trust expressed in plain language, and he certainly did not mean to suggest that the character of the trustee is a thing which is to be disregarded in construing the gift as a whole. I can well conceive of cases where the purpose named takes its colour from the character of the trustee, but, where one finds that there is plain language, it is not legitimate to cut down that language by reference to the fact that the trustees named hold a particular office, or have a particular character.

To my mind, the whole question in this case turns on whether or not the words "for parish work" can in some way be limited, either by their own inherent meaning or by reference to the character and quality of the trustees. I have come to the conclusion, and I do so with regret, that that limitation cannot be imposed upon the words. It seems to me that the words "for parish work" are of a very wide character, and embrace not merely those limited functions in the parish which it is the duty of the vicar to perform, and not merely those limited functions in the parish which it is the duty of the churchwardens to perform. Nor can I limit those words by narrowing them down to religious purposes in the strictly charitable sense. It appears to me that, taking them as words of ordinary English, they cover any activity in the parish, any work in the parish, which trustees of that character may be expected to perform, whether that work be strictly a religious purpose or strictly a charitable purpose, or whether it be a work considered to be conducive to the good of religion, or considered to be benevolent, or generally useful to the inhabitants of the parish or the congregation of the church. It seems to me that the words "for parish work" cannot be cut down or limited, either by construing them in isolation or by reference to the character of the trustees. There is in truth no joint function of the vicar and churchwardens, in the sense that there is something specific which they are both under a duty to do. It is perfectly true that, as a body, they are concerned in different directions, and with different duties, in the conduct of the religious activities of the church. Nevertheless, they are the most convenient trustees for any benevolently-minded person to choose who is minded to select trustees in whose hands money will be placed for general activities in the parish, the kind of activities which one would expect to find carried out by such persons, without any necessary limitation to charitable purposes, but covering general benevolent, social and other purposes which are commonly carried on in parishes. We have ample authority for the proposition that activities of that kind, however estimable they may be, even though they may be conducive to the good of religion, will not be charitable. The first passage to which I would like to refer is another passage from the judgment of the Privy Council in *Dunne* v. *Byrne* (1), in which Lord Macnaghten says, at p. 410:

> It can hardly be disputed that a thing may be "conducive," and in particular circumstances "most conducive," to the good of religion in a particular diocese

> or in a particular district without being charitable in the sense which the court attaches to the word, and indeed without being in itself in any sense religious.

I cannot myself find that under the words "for parish work" the trustees would be bound to avoid engaging in activities conducive to religion, but not strictly charitable. Under those words, it seems to me, they could, for example, do anything conducive to the good of religion. Once that is said, the case is at an end, because, as Lord Macnaghten points out, there are activities of that description which are not, and cannot be, described as charitable.

The only other cases to which I think I need refer are, first, the case of *Re Bain, Public Trustee* v. *Ross* (3). That was a case in which the gift was a gift to the vicar of a particular church "for such objects connected with the church as he shall think fit." The majority of this court in that case held that that was a good charitable gift, but it is important to observe what construction they placed upon it. They placed upon the words "such objects connected with the church as he shall think fit" a very narrow construction, which limited those words to the purposes of the church—that is, for the fabric and for the services conducted therein. Nobody could suggest, and, indeed, it is not suggested, that the words here "for parish work" can have such a limitation placed upon them. It is to be observed, however, that both Lord Hanworth, M.R., and Lawrence, L.J., who formed the majority of the court in that case, drew a very clear distinction between the church objects in the limited sense with which they were dealing there, and parochial objects, in the broader sense of activities of the vicar in the parish of the vicar, because it is to be noticed that it was the activities that were under discussion in that case. Lord Hanworth, M.R., says, at p. 232:

> I quite agree that if one allows one's mind to play over the objects which are parochial and illustrative of wide activities, such as are common to a great number of parishes, a loose interpretation can be given to these words embracing activities which could not be properly considered religious, and therefore an interpretation covering such a wide field as to prevent the bequest standing good.

What that means is that, if the words had been "unto the vicar for such objects connected with the parish as he should think fit," Lord Hanworth, M.R., would have decided the case the other way, and so would Lawrence, L.J., as appears from his judgment. Precisely the same argument would have been available in that case, because it would have been said: "Here is a gift to the vicar. The duties of the vicar are religious. He must therefore confine the application of this money to purely religious objects." It is quite clear that the majority of the Court of Appeal were not taking that view in that case. Then Lord Hanworth, M.R., goes on, at p. 232:

> I see no reason to import into "objects connected with the church" parochial activities which would embarrass our interpretation as against an interpretation connecting the use of the funds to the specific church indicated of which the recipient is the vicar.

Lawrence, L.J., says, at p. 234:

> The cases where the gifts were for purposes conducive to the good of a religion

> or to the good of a particular church are in my opinion distinguishable from the present case. Here the words, to my mind, are apt and proper to describe objects which are directly connected with the church in contradistinction to objects which are only conducive to the welfare of the parishioners, or to the congregation who attend the church . . .

In the present case, it seems to me that the words "for parish work" A are wide enough to cover activities which are conducive to the welfare of the parishioners or conducive to the welfare of the congregation who attend the church, and are not to be limited to the strictly ecclesiastical and religious purposes.

The other case is the case of *Re Stratton, Knapman* v. *A.-G.* (4). That B was a case where the gift was a gift to the vicar for the time being of a particular parish "to be by him distributed at his discretion among such parochial institutions or purposes as he shall select." It was said there by LORD HANWORTH, M.R., at p. 200:

> But the words of the codicils impose no restriction upon the activities to which C the trust moneys might be applied nor is the vicar's discretion in any way limited. The only condition is that what is done shall have something to do with the parish; that might be something to do with the church or it might not. In law it is not every parochial purpose which is a charity. Many objects are commonly called charitable, but if they are merely benevolent, or humanitarian, then, however excellent they may be, they are not necessarily charitable in the legal sense.

D In the present case, it is perfectly true that the words are not "parochial institutions or purposes," but are "parish work," but, with all respect to those who think otherwise, I cannot help thinking that that is a distinction without difference. The expression "parish work" appears to me, at any rate, to cover parish purposes, and parish purposes must cover E things which are benevolent or humanitarian, which, while conducive in a long view to the good of religion, cannot be called religious purposes within the meaning of the authorities. As I say, I come to this conclusion with regret, but I find the principles which are to be applied, and the language of the gifts, too compelling to enable me to come to a F different one, and, in my opinion, this appeal must be dismissed.

CLAUSON, L.J.: I feel a natural diffidence in putting forward an opinion which differs from that expressed by SIR WILFRID GREENE, M.R., and which may be found, I understand, to differ from that to be expressed G by FARWELL, J., but I have formed a clear view as to the construction in this particular will of this particular lady of the very few words which it is the duty of this court to construe.

I will first premise that it is well-settled law that a gift to "the vicar for the time being of A." is not a gift to him for his own use, but is a H gift to him for ecclesiastical purposes connected with his benefice. Further, it is to be observed that in 1907 JOYCE, J., in the case of *Re Garrard, Gordon* v. *Craigie* (5), after referring to the authorities which establish the proposition which I have just stated, held that a gift "to the vicar and churchwardens for the time being of Kington to be applied by them in such manner as they shall in their sole discretion think fit" was a good charitable gift for ecclesiastical purposes in the parish. He said, at p. 384:

> Having regard to the decision of Kindersley, V.-C., in *Thornber* v. *Wilson* (6), and see *Re Delany, Conoley* v. *Quick* (7), it is clear that a legacy to the vicar for the time being of a parish is a charitable gift for the benefit of the parish for ecclesiastical purposes. The churchwardens are the officers of the parish in ecclesiastical matters, so that a mere gift or legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purposes in the parish.

With those observations, I turn to this particular will, premising that it has to do with two ecclesiastical districts, one the parish or ecclesiastical district of St. Colomba's Church, Hoxton, and the other the parish or ecclesiastical district of St. Cuthbert, Philbeach Gardens, Kensington. It should perhaps be mentioned—I agree with Sir Wilfrid Greene, M.R., that it is a very small point in the circumstances—that it happens that these two parishes are not, for any purpose whatever, civil parishes. They are parishes which were organised under the New Parishes Act, 1843, and are purely ecclesiastical districts. So that the parish of St. Columba, Hoxton, and the parish of St. Cuthbert, Philbeach Gardens, are districts the official character of which arises from the fact that they are the districts within which the minister or incumbent of those respective churches has the cure of souls. That will be found to be the case on reference to the New Parishes Act, 1843. I do not myself attach very much importance to the point, for this reason. It is true that, under modern legislation—when I say modern, it dates to the Tudor period, but it is comparatively modern having regard to the existence of parishes—parishes have a certain civil aspect, and the incumbent of some parishes has certain civil duties, as, for example, in the case of certain London and other parishes with select vestries, of which the vicar for the time being was chairman of the vestry, which had purely, or practically entirely, civil duties to perform. In the same way, churchwardens from time to time have had imposed upon them certain civil duties. It happens, however, that the churchwardens in the cases of these particular churches, under the very Act which set up the parishes in question, have ecclesiastical duties only. However, I do not attach much importance to the point, for the reason that, *prima facie*, I should have thought that a reference to the vicar and churchwardens in a will which gives to them a gift as vicar and churchwardens of the parish would certainly be primarily to them, almost inevitably to them, in the capacity of ecclesiastical officers.

The words of the will are these. The lady gives her residue to trustees upon trust to stand possessed

> In equal shares for St. Clement's Mission, Notting Dale . . . for their mission work.

I do not understand that any question is raised in this case, but I understand that that is a perfectly good charitable gift. Then, secondly:

> The Society for the Propagation of the Gospel in Foreign Parts.

That, again, no one will doubt, is a perfectly good charitable gift. Thirdly:

> The vicar and churchwardens of St. Columba's Church, Hoxton, for parish work, and the vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens, Kensington, for parish work.

A The question is, in each case, what is the meaning of the gift to the vicar and churchwardens named for parish work?

It seems to me material to bear in mind that the functions of the vicar of the church can be summed up in this, that he has the cure of souls in the particular district, parish or ecclesiastical district which is B the site of his benefice. The churchwardens, as I have said, have certain ecclesiastical, and, in these particular districts, entirely ecclesiastical, duties to perform, which possibly, to some slight extent, overlap those of the vicar, in the sense that they may possibly have some sort of duty to assist him in relation to the cure of souls, but their primary function C is no doubt to deal with more material matters, the functions of the church, and so forth. The gift is to them for parish work, but in the context I feel driven to the conclusion that "for parish work" means "for their parish work." If a man has a particular function and one gives him a gift for some work, *prima facie* it would be for the work D which he has to perform by reason of the office he fills. I feel no difficulty in so construing these words—construing them, that is to say, as a gift to the vicar and churchwardens for their parish work, they being ecclesiastical officers of this parish.

I think that it would be agreed that, if I am right in so construing E the words, and if it is for the parish work of the vicar and churchwardens —that is to say, to finance the vicar in the various multifarious duties which are covered by his duty to care for the souls of his parishioners (what is legally termed for the cure of souls)—and to assist the churchwardens in their duties of furnishing proper ornaments for the church F and keeping the church in repair, it would seem reasonably clear, I should have thought, that the gifts come well within the strict legal definition of "charity," because they are gifts for a religious purpose, aimed at the religious edification and instruction of the parishioners, and in providing the material means, in the shape of church ornaments G in church, for attaining the end of performing the ceremonies which, according to the law of the church, are required for perfecting the edification and instruction of the parishioners. The difficulty I feel in the case—and indeed it is a real difficulty—is that, taking the view I do of those words, I feel the gravest doubt as to whether, had I been sitting H in the Court of Appeal in *Re Stratton, Knapman* v. *A.-G.* (4), I should have felt able to give to the words used in that case, which were, however, different words, the meaning which the members of the Court of Appeal, according to the reported decision, gave to those words. Remembering warnings from the highest quarters that the worst thing one can do is to construe one set of words in one will by the meaning given to another set of words in another will, I feel bound to say, notwithstanding that decision, that I am convinced that my construction, the construction I have stated, of the words in this will is the correct one. However, I repeat that it is with some diffidence that I make that statement, because I understand that I am differing from my two colleagues in the court. A

FARWELL, J.: I agree with the judgment of SIR WILFRID GREENE, M.R. The question arises as to the construction of a few words in the will of Miss Emma Mary Ashton. The gift is a gift of a portion of the residuary estate of the lady to: B

> the vicar and churchwardens of St. Columba's Church, Hoxton, for parish work, and the vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens, Kensington, for parish work.

The question is whether or not those gifts are good gifts.

There is, of course, no question here of the rule against perpetuities. C The gifts, if they are not good, are bad because they are too vague; they are void for uncertainty. The question is whether the words can be so construed as to prevent the gift from being void for uncertainty. When one looks at the gifts, this, at any rate, is plain, if nothing else is, that the vicar and the churchwardens in each case are not given this share of D residue beneficially. They take as trustees, and nothing else. That being so, one naturally looks to see whether the trust, or the purpose for which they are given the money, is defined in the will. It may be that, if there were no definition of the purpose for which the money was to be used, it would then be possible, as was possible in *Re Garrard, Gordon* v. E *Craigie* (5), where JOYCE, J., found it possible, to say that the vicar and churchwardens, not being entitled to take beneficially, took upon trusts which were not in terms declared, and that therefore the trusts could be extracted from the position which the trustees held. In this case, that is not the position, because here the purpose for which they are to take F the money and to apply it is in each case for parish work. If the trust is a trust for parish work, then, in my judgment, it is not permissible to cut down the ordinary meaning of those words "parish work" by reference to the offices held by the trustees. It is only, in my judgment, in a case where the trust itself is not specified that the character of the trustees G may be sufficient to indicate the purpose of the trust. In this case, the trust is declared as being for parish work, and, unless it is limited in a way in which, in my judgment, this court cannot limit it, the words "for parish work" must be given their ordinary meaning. In my judgment, "parish work" means that which is sometimes compendiously H called "good works" in the particular parish—that is to say, the various activities which the vicar and churchwardens promote and carry on in the parish for the good of the parishioners, not merely for their religious good, but for their good generally in various ways, which, no doubt, although many of them are most benevolent and excellent, are not charitable in the strict sense of the word. The moment one gets to that position, that the vicar and churchwardens are to hold this money upon trusts, some of which are not strictly charitable, the position becomes such that the gift must fail because it is void for uncertainty. In this case, if the vicar and churchwardens were to apply the money for some purpose, however benevolent, which was not strictly charitable, I cannot myself see that they would be committing any breach of trust at all, nor can I see that the Attorney-General would be entitled to move the court to restrain them from so using the money. The moment one gets to that position, it follows from a long line of authorities that the gift is void for uncertainty. The conclusion to which LUXMOORE, J., came with regret, and to which I also come with regret, that the gift fails, is, in my judgment, the right conclusion.

Appeal dismissed.

Solicitors: *Thomas Eggar & Son* (for the appellants); *Field, Roscoe & Co.* (for the Westminster Bank, Ltd.); *Ravenscroft, Woodward & Co.* (for the next-of-kin); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

BERRIDGE *v.* EVERARD.

[COURT OF APPEAL (Slesser and Scott, L.JJ.), **February 18, 1938.]**

Practice—Remission of actions to county court—Value of expectation of life—Difficult questions of law—County Courts Act, 1934 (*c.* 53), *s.* 46 (2).

An order had been made remitting to the county court an action in which the administrator of an infant, who had been killed in a motor accident, was claiming damages in respect of loss of expectation of life:—

HELD: the case would involve considering whether a child was entitled to greater damages in respect of loss of expectation of life larger than an adult, and also whether loss of enjoyment of life ought to be taken into account. These were difficult questions of law, which have not yet been decided, and therefore it was desirable that the case should be tried in the High Court.

[EDITORIAL NOTE. This case applies the law as recently settled in *Phillips* v. *Lloyd & Sons, Ltd.*, [1938] 1 All E.R. 226, that cases raising difficult questions of law should not be remitted to the county court. The present case raises questions on the valuation of the loss of expectation of life, which for the present must be considered as difficult questions of law.

AS TO REMISSION TO COUNTY COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 181, 182, paras. 284, 285; and FOR CASES, see DIGEST, Vol. 13, pp. 484, 485, Nos. 340-352. See also NEW COUNTY COURT PRACTICE, 1938, pp. 45-47.]

Cases referred to:

(1) *Rose* v. *Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.

(2) *Culver* v. *Beard*, [1937] 1 All E.R. 301; Digest Supp.

(3) *Stevens* v. *Walker*, [1936] 2 K.B. 215; [1936] 1 All E.R. 892; Digest Supp.; 154 L.T. 550.

(4) *Trubyfield* v. *Great Western Ry. Co.*, [1937] 4 All E.R. 614; Digest Supp.; 158 L.T. 135.

(5) *Morgan* v. *Scoulding*, [1938] 1 All E.R. 28; Digest Supp.

APPEAL from an order of HILBERY, J., dated Dec. 21, 1937.

R. T. Paget for the appellant.

Harold Whitmee for the respondent. A

Paget: The question here is the probable amount of damages. Another point to be considered is the difference in the rules concerning appeals from a county court and from the High Court. Judges are at present awarding very different amounts in this type of case, and, until the question as to the basis on which damages should be awarded B has been decided, any appeal from a county court is bound to be hampered by the rules. [Counsel referred to *Stevens* v. *Walker* (3), *Culver* v. *Beard* (2), *Rose* v. *Ford* (1), *Trubyfield* v. *Great Western Ry. Co.* (4), and *Morgan* v. *Scoulding* (5).]

Whitmee: The judge had all the relevant material before him, and C he considered it and used his discretion. That should not be disturbed. I rely on *Culver* v. *Beard* (2).

SCOTT, L.J.: I reluctantly assented in *Culver* v. *Beard* (2), and I think that I was wrong.

SLESSER, L.J.: This is an appeal from an order made under the D County Courts Act, 1934, s. 46 (2), transferring to the county court an action commenced in the High Court in which it is admitted that there is no evidence of any means on the part of the executors of an infant. This claim is of a kind which is now becoming familiar, the basis of the action being that a child has been deprived of its expectation of life, E which, as LORD ATKIN pointed out in *Rose* v. *Ford* (1), at p. 859, is a thing of value. Under a recent statute, this thing of value vests in the estate, and the executors say that they have been damnified. The question we have here to consider is, were there grounds on which the judge could properly have exercised his discretion? I agree with Mr. F Whitmee that it is *prima facie* a matter for the judge's discretion, but there are certain matters which must be taken into account. They are stated in *Culver* v. *Beard* (2) and *Stevens* v. *Walker* (3). There are only two which have here to be considered: (i) whether the claim will necessarily be one for an amount above the county court jurisdiction, and (ii) whether G difficult legal problems will arise. I do not think it necessary to consider the first point, because the amount of the claim must depend upon a legal problem which has yet to be considered—that is, as to whether that thing of value is to be estimated having regard to the length of life which the deceased person was likely to have enjoyed. That is to say, whether a H child, having an expectation of life greater than an adult, is therefore entitled to larger damages. Another point which has yet to be decided is whether the enjoyment which a person would have in life, which is easier to determine when a person is older than when he is young, should also be taken into account, or whether both these matters are irrelevant.

In my view, these matters clearly raise difficult questions of law, and the judge misdirected himself, and his discretion cannot be supported. This case necessarily raises difficult questions of law, and is more appropriate to be dealt with in the High Court.

SCOTT, L.J.: I agree.

Appeal allowed.

Solicitors: *Gibson & Weldon*, agents for *C. Leslie Hale*, Coalville (for the appellant); *Berrymans* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

COMPANIA NAVIERA VASCONGADA *v.* STEAMSHIP CRISTINA AND ALL PERSONS CLAIMING AN INTEREST THEREIN.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham), **January 13, 14, 17, 18, 20, March 3, 1938.**]

Shipping—Foreign-owned vessel—Requisition by foreign government—Vessel outside territorial jurisdiction—Claim for possession by owners—Motion to set aside writ—Impleading a foreign government.

The plaintiffs were the owners of the Cristina, a ship registered at Bilbao. The Spanish government issued a decree requisitioning all vessels registered at Bilbao. At the time when the decree was issued, the Cristina was not in a Spanish port, nor in Spanish territorial waters, nor did she subsequently enter such waters. Upon her arrival at Cardiff, the Spanish Consul forcibly took possession of the Cristina. The plaintiffs issued a writ *in rem* to regain possession of the ship, and arrested the ship. The Spanish government moved to set aside the writ, on the ground that the result of the action would be to implead a foreign state:—

HELD: the requisitioning of the ship gave the Spanish government a right or interest in it which could not be interfered with by the courts of this country, and the writ ought, therefore, to be set aside.

Per LORD WRIGHT: the rule that a foreign state cannot be impleaded is not limited to ownership. It applies to cases where what the government has is a lesser interest, which may be not merely not proprietary but also not even possessory.

Order of Court of Appeal ([1937] 4 All E.R. 313) *affirmed.*

[EDITORIAL NOTE. The doctrine of the immunity of foreign public states from the process of our courts has from time to time been extended; but the application of the doctrine in the present case is held by the House of Lords to be well within its accepted limits at the present time. The subject of the extension of the doctrine to ships owned by foreign governments and engaged in ordinary trading is discussed, but their Lordships have expressly reserved any decision on this point.

As TO REQUISITIONED VESSELS, see HALSBURY, Hailsham Edn., Vol. 1, p. 95, para. 121; and FOR CASES, see DIGEST, Vol. 1, pp. 109-111, Nos. 127-146.]

Cases referred to:

(1) *The Broadmayne*, [1916] P. 64; 41 Digest 814, *6753*; 85 L.J.P. 153; 114 L.T. 891.

(2) *The Messicano* (1916), 32 T.L.R. 519; 41 Digest 814, *6754*.
(3) *The Crimdon* (1918), 35 T.L.R. 81; 41 Digest 815, *6762*.
(4) *The Gagara*, [1919] P. 95; Digest Supp.; 88 L.J.P. 101; 122 L.T. 498.
(5) *The Parlement Belge* (1880), 5 P.D. 197; 41 Digest 931, *8213*; 42 L.T. 273; *on appeal from* (1879), 4 P.D. 129.
(6) *The Santissima Trinidad* (1822), 7 Wheat. 283.
(7) *The Porto Alexandre*, [1920] P. 30; Digest Supp.; 89 L.J.P. 97; 122 L.T. 661.
(8) *The Jupiter*, [1924] P. 236; Digest Supp.; 93 L.J.P. 156; 132 L.T. 624.
(9) *Mortensen* v. *Peters* (1906), 8 F. (J.) 93; 42 Digest 671, case *825 iii*.
(10) *Mighell* v. *Johore (Sultan)*, [1894] 1 Q.B. 149; 38 Digest 6, *10*; 63 L.J.Q.B. 593; 70 L.T. 64.
(11) *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797; Digest Supp.; 93 L.J.Ch. 343; 131 L.T. 676.
(12) *Young* v. *Scotia (S.S.)*, [1903] A.C. 501; 41 Digest 853, *7176*; 72 L.J.P.C. 115; 89 L.T. 374.
(13) *Harmer* v. *Bell, The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 41 Digest 927, *8168*; 19 L.T.O.S. 235.
(14) *The Dictator*, [1892] P. 64, 304; 1 Digest 224, *1499*; 61 L.J.P. 73; 67 L.T. 563.
(15) *The Gemma*, [1899] P. 285; 1 Digest 224, *1500*; 68 L.J.P. 110; 81 L.T. 379.
(16) *The Exchange* (1812), 7 Cranch. 116.
(17) *The Jassy*, [1906] P. 270; 41 Digest 815, *6761*; 75 L.J.P. 93; 95 L.T. 363.
(18) *Berizzi* v. *Pesaro* (1925), 271 U.S. 562.
(19) *Briggs* v. *The Light Ships* (1865), 11 Allen (Mass.) 157.
(20) *Morgan* v. *Lariviere* (1875), L.R. 7 H.L. 423; 1 Digest 48, *390*; 44 L.J.Ch. 457; 32 L.T. 41; *affg.* S.C. (1872), 7 Ch. App. 550.
(21) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; Digest Supp.; 102 L.J.Ch. 309; 149 L.T. 65.

Appeal from an order of the Court of Appeal (Greer, Slesser and Scott, L.JJ.), dated Nov. 8, 1937, and reported in [1937] 4 All E.R. 313, affirming an order of Bucknill, J., dated Oct. 15, 1937, setting aside a writ *in rem* and the arrest of the steamship Cristina in an action in which the appellants were plaintiffs and the respondents, who had entered a conditional appearance, were defendants. The facts and the arguments are set out in the opinion of Lord Wright.

H. U. Willink, K.C., *H. G. Willmer* and *V. R. Idelson* for the appellants.

G. St. C. Pilcher, K.C., *Owen L. Bateson* and *John Forster* for the respondents.

Lord Atkin: My Lords, the circumstances in which the writ in this action was issued and the Cristina was arrested have been set out in the opinion of my noble and learned friend Lord Wright, which I have had the advantage of reading, and I need not repeat them.

The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted on to our domestic law which seem to me to be well-established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle, as to whether it extends to property used only for the commercial purposes of the sovereign or to personal private property. In this country, it is, in my opinion, well-settled that it applies to both.

I draw attention to the fact that there are two distinct immunities appertaining to foreign sovereigns, for at times they tend to become confused, and it is not always clear from the decisions whether the judges are dealing with one or the other or both. It seems to me clear that, in a simple case of a writ *in rem* issued by our admiralty court in a claim for collision damage against the owners of a public ship of a sovereign state in which the ship is arrested, both principles are broken. The sovereign is impleaded and his property is seized.

In my opinion, the facts of this case establish the same breach of the two principles as in the illustration just given. I entertain no doubt that the effect, and the intended effect, of the action of the Spanish Consul at Cardiff in July, 1937, was to " purge " the officers and crew of the ship of those who were disaffected to the present Spanish government, and to secure that the new master, officers and crew should hold the ship for the government, and that, from and after July 14, the master, officers and crew held the ship, not for the owners, but for the government, and that by the master, officers and crew the government were in fact in possession of the ship. I cannot pay serious attention to the suggestion that all that the Consul intended to do was to supply a well-affected new master on behalf of the owners.

These being the facts, I come to the conclusion that, when the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel Cristina and all persons claiming an interest therein, in the body of which the same ship and all persons claiming an interest therein were commanded within 8 days to cause an appearance to be entered for them in the Probate, Divorce and Admiralty Division, and on which they indorsed the claim to have possession adjudged to them of the said steamship or vessel Cristina, they were directly impleading the Spanish government, whom they knew to be the only persons interested in the Cristina other than themselves, and from whom they desired that possession should be taken after it was adjudged to them. We have had an interesting exposition of the history of admiralty practice and the evolution of the writ *in rem*. It is plain that it began with the arrest of a named defendant; in his absence, any of his property in the jurisdiction, including his ship or ships, could be arrested. Eventually the ship over which some maritime claim was asserted could alone be arrested. But in all cases, as in the present practice, when a defendant has appeared, the claim is against him personally, and, though it is enforced in the first instance by sale of the ship, or enforcement of the bail, a damage claim is not in our jurisprudence limited to the value of the ship. In these days, it is unusual to name defendants. When the defendants are described as "the owners of a vessel" they can be at once identified. When persons are not entitled the defendants, but in the body of the writ are cited to appear as persons claiming an interest, there is said to be some uncertainty as to whether they appear under leave to intervene or without such leave. In any case, when they do appear, they appear as defendants, and as such I conceive that they are impleaded. When they cannot be heard to protect their interest unless they appear as defendants, I incline to hold that, if they are persons claiming an interest, they are, by the very terms of the writ, impleaded. In the present case, however, where persons claiming an interest are the only persons entitled defendants, and the Spanish government are the only persons claiming an interest adverse to the plaintiffs, I have no doubt, not only that the government were in fact impleaded, but also that they were intended by the plaintiffs to be impleaded.

The second point seems to me, if possible, to be clearer. It is well-established that the court will not arrest a ship which is under the control of a sovereign by reason of requisition: *The Broadmayne* (1), *The Messicano* (2), *The Crimdon* (3).

The present case, however, is not one of control for public purposes, but of actual possession for public purposes. It is indistinguishable from *The Gagara* (4), which in the Court of Appeal was decided solely on the ground that the ship was in the actual possession of a foreign sovereign—namely, the state of Esthonia. The courts of our country will not allow their process to be used against such a ship, and the arrest cannot be maintained. In the present case, I find it unnecessary to decide many of the interesting points raised in the argument for the appellants as to whether the ship was rightly in the possession of the government, what was the exterritorial effect of the Spanish decree, what implied restrictions in different circumstances might be attached to sovereign immunity, when, if ever, the assertion of the sovereign as to his property or possession is conclusive. In matters of such grave importance as those, involving questions of international law, it seems to me very expedient that courts should refrain from expressing opinions which are beside the question actually to be decided. In the present case, in my opinion, the decisions of the trial judge and the Court of Appeal were right, and should be affirmed, and this appeal should be dismissed with costs.

Lord Thankerton: My Lords, in my opinion, on the facts in this case, the decisions of the trial judge and of the Court of Appeal were right, and should be affirmed.

It is admitted that the government of the Republic of Spain are the government of a foreign sovereign state, fully recognised as such by His Majesty's government. In my opinion, it is sufficiently established that the Spanish government, without a breach of the peace, obtained by their agents *de facto* possession of the ship on July 14, 1937, and have A since remained in *de facto* possession. I am further of opinion that it is sufficiently established that such possession is for public uses, for the purposes of prosecution of the civil war in Spain. The Spanish government decline to submit to the jurisdiction, and it has not been maintained by the appellants that there are any facts from which such submission B can be implied.

I agree with my noble and learned friend LORD ATKIN that, in the present case, not only were the Spanish government in fact impleaded, but also they were intended to be so impleaded. Further, the order sought in the present case would necessarily displace the *de facto* possession C of the Spanish government, and I agree with my noble and learned friend that the doctrine of immunity of the property of a foreign sovereign state dedicated to public uses includes the case of actual possession for public uses. In this view, the case clearly comes within the principles laid down in *The Parlement Belge* (5) by BRETT, L.J.

D But, my Lords, I have some doubt as to whether the proposition that the foreign sovereign state cannot be impleaded is an absolute one, the real criterion being the nature of the remedy sought. To indicate this, let me quote the principles laid down in *The Parlement Belge* (5). BRETT, L.J., states, at p. 205:

> E The first question really raises this, whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be, or in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any court of some property F of every sovereign is admitted to be a part of the law of nations.

This passage suggests that the absolute exemption is of the person of the sovereign from adverse suit, but that, in the case where property of a sovereign is not admitted by the agreement of nations to be exempt, action *in rem* against such property which is within the territorial juris- G diction is available, even if the sovereign be invited to contest the suit, if he so choose.

It happens that *The Parlement Belge* (5) affords an interesting illustration, for SIR ROBERT PHILLIMORE, in the Probate Division, had rejected the claim to exemption, and his grounds are stated in the following H passage, at pp. 148, 149:

> Looking to the character of the suit and to other passages in the judgment [of STORY, J., in *The Santissima Trinidad* (6)] it seems to me clear that by the expression "public ship of the government" was meant a ship of war, and not any vessel employed by the government. But even if the term could be treated as more comprehensive and as including public ships such as I have referred to sent by the government on exploring expeditions, it would not include a vessel engaged in

commerce, whose owner is (to use the expression of Bynkershoek, *De Leg. Mercatore*) *strenue mercatorem agens.* Upon the whole, I am of opinion that neither upon principle, precedent, nor analogy of general international law, should I be warranted in considering *The Parlement Belge* (5) as belonging to that category of public vessels which are exempt from process of law and all private claims.

In the Court of Appeal, in delivering the judgment of the court, BRETT, L.J., held that the exemption was not confined to ships of war, A but applied to ships and other property of the sovereign destined to public uses. He then went on to consider whether *The Parlement Belge* (5) was so dedicated, and came to the conclusion that it was so dedicated, because its use for purposes of trade was only subservient to the main purpose of carrying the mails. Then comes a striking passage in the judgment, B at p. 220:

> The ship is not in fact brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and C equality of the state which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner.

It may be argued, as a logical inference from this passage, that an action *in rem* against property of the sovereign which is engaged in the private D trading, and which is not dedicated to public uses, is not to be regarded as inconsistent with the independence and equality of the state represented by such owner, and that any other view would lead to absolute exemption of all property owned by the sovereign, and not the exemption of some property only. E

If that were the correct inference, it would not justify the view of the Court of Appeal in the case of *The Porto Alexandre* (7)—where the ship was being used in ordinary commerce, the earning of freight being the sole interest of the Portuguese government, who owned it—that they were bound to hold it exempt by reason of the decision in *The Parlement* F *Belge* (5). They made no inquiry as to whether such an exemption was generally agreed to by the nations, and it seems to be common knowledge that they have not so agreed. This question, which has come to be of increasing importance of recent years, has not been considered by this House, and, as I hold that the Cristina was dedicated to public uses, G I find it unnecessary to decide it in this appeal. Accordingly, I express no opinion on the matter, but I desire to make clear that I hold myself free to reconsider the decision in *The Porto Alexandre* (7). In the later case of *The Jupiter* (8), counsel for the appellants conceded that he was precluded by the decision in *The Porto Alexandre* (7) from raising this H question in the Court of Appeal. I concur in the motion proposed by LORD ATKIN.

LORD MACMILLAN: My Lords, various topics of the first importance were mooted in the course of the argument on this appeal which it is unnecessary and inexpedient to discuss, but it may not be out of place to indicate the general principles which provide the setting for the particular problem which your Lordships have to solve.

It is an essential attribute of the sovereignty of this realm, as it is of all sovereign independent states, that it should possess jurisdiction over A all persons and things within its territorial limits, and in all causes, civil and criminal, arising within these limits. This jurisdiction is exercised through the instrumentality of the duly constituted tribunals of the land, but, just as individuals living in a community find it expedient to submit to some diminution of their freedom of action in favour of their B fellow-citizens, so also the sovereign states which constitute the community of nations have been led by courtesy as well as by self-interest to waive in favour of each other certain of their sovereign rights. The extent of these mutual concessions and their recognition are primarily matters of international, not of domestic, law, and, as must necessarily C be the case with all international law, which has neither tribunals nor legislatures to define its principles with binding authority, there may be considerable divergence of view and of practice among the nations. Hence, when questions involving international law arise in the domestic courts of a state, problems of great difficulty and gravity may emerge.

D LORD JUSTICE—GENERAL DUNEDIN in *Mortensen* v. *Peters* (9), a case which raised important issues of international law, used these well-chosen words, at p. 101:

> It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding E the international rights and duties of states which has been adopted and made part of the law of Scotland.

It is a recognised prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilised nations as a rule of inter-F national conduct, evidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions. It is manifestly of the highest importance that the courts of this country, before they give the force of law within this realm to any doctrine of international law, should be satisfied that it has the hall-marks of general G assent and reciprocity.

I confess that I should hestitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign state, for such a principle must be an importation from H international law, and there is no proved consensus of international opinion or practice to this effect. On the contrary, the subject is one on which divergent views exist and have been expressed among the nations. When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the courts of this country was first formulated and accepted, it was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined. It is only in modern times that sovereign states have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances. A

I recognise that the courts of this country have already, in cases which have been cited at the bar, gone a long way in extending the doctrine of immunity, but the cases which have gone furthest have not been hitherto considered in this House, and, like my noble and learned friend LORD THANKERTON, I desire to reserve my opinion on the question B raised in the case of *The Porto Alexandre* (7).

With these observations, I am content to express my agreement with what I understand to be the opinion of all your Lordships, that this action, which is directed to take—ultimately, if necessary, by force—a Spanish ship, requisitioned for public purposes by the duly recognised C government of Spain, and lying in a British port, out of the possession of that government, cannot be allowed to proceed in the courts of this country.

LORD WRIGHT: My Lords, the appellants, a Spanish company D carrying on the business of ship-owners at Bilbao, in Spain, initiated this action by a writ *in rem* in the Admiralty Division, claiming as sole owners of the steamship Cristina to have possession adjudged to them of the steamship. The writ was against the steamship or vessel Cristina and all persons claiming an interest therein. The Cristina, E which is a Spanish steamship registered at the port of Bilbao, was, on July 22, 1937, the date of the writ, lying in Queen's Dock, Cardiff, where she had arrived on July 8, 1937. At that latter date, she was in charge of a captain named Faustino Frias, appointed by and acting for the appellants, who were operating her. On July 9, 1937, he attended at the F office of the Spanish Consul at Cardiff, as Spanish shipmasters are bound to do by Spanish law on arriving at a foreign port, when he was handed a letter from the Consul requiring him to produce at the Consulate the *patente de navigacion* so that it could be noted in accordance with a decree of the Spanish government dated June 28, 1937, requisitioning G the ship. The captain failed to do so, and on July 13, 1937, the Consul by registered letter dismissed the captain, and also all other officers and members of the crew not in sympathy witn his government. On the following day, the Consul went on board with one Santiago Asolo, a new master, whom he had appointed in the name of the government H of the Republic of Spain, and broke open the captain's cabin, which was locked, but found that Frias, who had left the ship, had taken away the *patente de navigacion*. The new captain was placed in charge of the vessel on behalf of the Spanish government, and has remained so, save for a period when he was absent for family reasons, when he left the ship in charge of a mate, also appointed by the Consul for the Spanish government. The master and mate have sworn that at all material times they and the crew have had continuous possession of the ship on behalf of the Spanish government, and have held themselves and the ship at that government's disposal, subject to the arrest by the A court, which was effected by a warrant, issued on the appellant's application, supported by affidavits. It is also sworn that the ship's expenses have been disbursed by the Spanish government since the new captain took charge.

The Spanish Consul at Cardiff, who acted with the authority of the B Spanish Consul-General and the Spanish Ambassador in London, claimed to requisition the Cristina in virtue of a decree dated at Valencia June 28, 1937, and published in the *Gaceta de la Republica* on June 29, 1937, which provided that all the vessels registered at the port of Bilbao should be requisitioned and be at the disposal of "the legitimate government C of the Republic," and that any Spanish shipowner, or owner of a vessel so registered, should be bound to hand over its administration to the bodies designated by the government, for the purposes of receiving orders and instructions in relation to the service to be rendered by the vessel. The decree recited, *inter alia*, that, in order the better to be able D to meet the requirements of the war, the government considered it desirable to exercise immediate and direct control over services of marine transport, in order to carry into effect the plans of supplies, evacuation, or anything which the government might wish to carry out. The decree was stated to be directed to control and administer the means of marine E transport. It also contained various ancillary provisions, and in particular required entries to be made in the appropriate registers and ships' papers of any requisition under the decree.

On July 27, 1937, the respondent entered a conditional appearance "as owners or persons interested in this action, without prejudice to an F application to set aside the writ or service thereof." On the same day they lodged a notice of motion claiming that the writ, the arrest and all subsequent proceedings should be set aside, on the grounds that the Cristina was the property of the government of Spain, a foreign independent state, which declined to sanction the proceedings, that the G Cristina was in the possession of the government by its duly authorised agent, that the government had a right to the possession of the Cristina, and that the action impleaded a foreign sovereign state—namely, the government of Spain. Among the affidavits in support of the application was one from the Counsellor of the Spanish Embassy in London, H affirming on oath that by virtue of the decree the government of Spain "claims and is entitled to possession of the said ship under the said requisition." He further deposed that the government of Spain was unwilling to submit to the jurisdiction of the court, and that the proceedings impleaded that government. He also deposed that the requisition had been effected at Cardiff by notices from the Consul at Cardiff to the captain, agents and cargo-owners of the ship and to the port and immigration authorities there.

At the trial, Bucknill, J., granted the application, and set aside the writ, arrest and proceedings. His decision was affirmed by the Court of Appeal, from whose order this appeal is now brought to this House.

At the trial, it was admitted on behalf of the appellants that the respondent, the Republican government of Spain, is an independent sovereign state, recognised by His Majesty's government. It was not contested that this admission involved that the Republican government was the sole government recognised by His Majesty's government in and for Spain. The case has accordingly proceeded throughout on that footing. This House and the courts below have thus no judicial knowledge, save as appears from the recitals in the decree, of the conflict which it is general knowledge is going on in Spain, or of the division of territory between the contesting forces. It has also been admitted that the Cristina was not in Spanish territorial waters from the date of the decree until the date of the facts alleged to constitute the requisition, when she was in British territorial waters.

The respondent does not contend that it is the owner of the Cristina, but says that it is and was at all material times in *de facto* possession of the Cristina, and was therefore without its consent impleaded by the writ *in rem* claiming possession adversely to its actual possession. Such a proceeding, it contends, is inconsistent with its position as an independent sovereign state recognised by His Majesty's government. It further contends that the action involved a claim to interfere with its right of direction and control, coupled with actual possession, acquired by reason of the requisition. This, though not ownership, is, it is said, a right in the ship in the nature of property, and was, as being the property of an independent sovereign state, immune from the interference of the court either by the arrest or by an order annulling the requisition and giving possession to the appellants and ousting the respondent from possession. The word requisition, while not a term of art, is familiar, and has been constantly used to describe the compulsory taking by government, invariably—or at least generally—for public purposes of the user, direction and control of the ship, with or without possession. In my judgment, both contentions are well-founded, and the order of the courts below may be sustained on either ground. The grounds, however, are separate, and call for separate analysis, though both alike are based on the general principles of international law, according to which a sovereign state is held to be immune from the jurisdiction of another sovereign state. This is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law, accepted among the community of nations. It is binding on the municipal courts of this country in the sense and to the extent that it has been received and enforced by these courts. It is true that it involves a subtraction from the sovereignty of the state, which renounces *pro tanto* the competence of its courts to exercise their jurisdiction even over matters occurring within its territorial limits, though to do so is *prima facie* an integral part of sovereignty. The rule may be said to be based on the principle *par in parem non habet imperium*: no state can claim jurisdiction over another sovereign state. It may also be rested on the circumstance that in general the judgment of a municipal court could not be enforced against a foreign sovereign state, or that the attempt to enforce might be regarded as an unfriendly act, or it may be taken to flow from reciprocity, each sovereign state within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others. I need not discuss other possible explanations. The rule is naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights. There may indeed be particular and special exceptions not necessary here to discuss. The principle has been received and applied by the courts of this country in many decided cases, and in particular many cases dealing with states of fact similar to the facts here in question, but the rule applies only as between sovereign states recognised as such by His Majesty's government. For the purposes of the present case, so far as concerns Spain, the respondent is a sovereign state.

The first of the two rules here relevant—namely, that the independent sovereign may not be directly or indirectly impleaded in the courts of this country without its consent—has been recognised as a general proposition in many cases, as, for instance, *Mighell* v. *Johore* (*Sultan*) (10), an action *in personam*. Similarly, in *Duff Development Co.* v. *Kelantan Government* (11), VISCOUNT CAVE, at p. 805, referred to the right of an independent sovereign state by international law to the immunity against legal process which was defined in *The Parlement Belge* (5), and LORD SUMNER said, at p. 822:

> The principle is well settled, that a foreign sovereign is not liable to be impleaded in the municipal courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection.

The principle is stated without any special reference to reciprocity. *The Parlement Belge* (5), however, shows clearly that a sovereign may be impleaded as much by an action *in rem* as by an action *in personam*. As was said by the Privy Council in *Young* v. *S.S. Scotia* (12), at p. 504:

> Where you are dealing with an action *in rem* for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner . . .

In *The Parlement Belge* (5) (a case to which I shall later refer in connection with the immunity of the sovereign's property), the action *in rem* was brought under a claim for collision damage done by a Belgian state mail-packet. It was contended that the sovereign was not impleaded (*sc.* personally), but only the *res.* BRETT, L.J., in delivering the judgment of the Court of Appeal, said, at p. 219:

> [*Harmer* v. *Bell, The Bold Buccleugh* (13)] decides that an action *in rem* is a different action from one *in personam* and has a different result. But it does not decide that a court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead [a man] in such a way is to call upon him to sacrifice either his property or his independence. To place him A in that position is a breach of the principle on which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court.

I think that the substantial soundness of this ruling is corroborated by B considering the nature of the modern writ *in rem.* The history and effect of that writ have been fully explored by JEUNE, J., in *The Dictator* (14), approved and followed by the Court of Appeal in *The Gemma* (15). It seems that originally the warrant was issued for the purpose of compelling the defendant to appear and submit to the court, C and was directed, not merely against the property said to be the instrument of injury, but also against any property of the defendant, or even against himself personally. The modern writ *in rem*, however, has become a machinery directed against the ship charged to have been the instrument of the wrongdoing in cases where it is sought to enforce D a maritime or statutory lien, or, in a possessory action, against the ship whose possession is claimed. To take the present case, the writ names as defendants the Cristina and all persons claiming an interest therein, and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel), and gives notice E that, in default of so doing, the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment *in rem* is a judgment against all the world, and, if given in favour of the plaintiffs, would conclusively oust the defendants from the possession which, on the facts I have stated, they beyond question *de facto* enjoy. F The writ by its express terms commands the defendants to appear or to let judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of BRETT, L.J., the independent sovereign is thus called upon to sacrifice either its property or its independence. It is, I think, clear that no such G writ can be upheld against the sovereign state unless it consents. It is therefore given the right, if it desires neither to appear nor to submit to judgment, to appear under protest, and to apply to set aside the writ or to take other appropriate procedure with the same object. It may be said that it is indirectly impleaded, but I incline to think that H it is more correct to say that it is directly impleaded. The defendants cited are "all persons claiming an interest in the Cristina," a description which precisely covers, on the facts of the case, the Spanish government, and, to judge by the affidavits filed by the appellants in applying to obtain the warrant to arrest, no one else. Under the modern and statutory form of a writ *in rem*, a defendant who appears becomes subject to liability *in personam*. Thus, the writ *in rem* becomes in effect also a writ *in personam*. This emphasises the view that the writ directly impleads the Spanish government.

The crucial fact in this connection is simply that *de facto* possession was enjoyed by the Spanish government. The position would obviously have been quite different if the respondent were seeking to obtain possession by the process of the court, instead of resisting an attempt by the process of the court to oust it from actual possession.

In the present case, the fact of possession was proved. It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the government that the vessel is in its possession. I should hesitate, as at present advised, so to hold, but the respondent here has established the necessary facts by evidence. It is unnecessary to consider by what mode the respondent obtained possession. It is enough to ascertain that it had possession at the time when the claim to immunity was made. Nor is it necessary to consider here whether any particular person not entitled to diplomatic immunity has made himself liable to English law.

The appellants have contended that the rule that the sovereign cannot be impleaded is not absolute or universal, and have instanced as possible exceptions cases of title to real property in the jurisdiction, or suits to administer a fund in court in which the foreign sovereign is interested, or representative actions such as debenture holders' actions where the sovereign holds debentures. Whatever may be the position in such cases, they are essentially different from, and afford no guidance for, the present case, and I do not need here to discuss them.

This ground would by itself, subject to some questions to be considered below, be enough to entitle the respondent to succeed, but there is a second ground on which the writ should, in my judgment, be set aside, and that is that it claims to interfere with the property of the foreign sovereign. That the court has in general no jurisdiction to do this is illustrated by *The Parlement Belge* (5). One ground of the decision that the writ should be set aside was that it was *in rem* against the Belgian packet. BRETT, L.J., enforces the principle by a copious citation of English and United States authorities, and rightly concludes, at pp. 214, 215:

> The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons. In the first place, they have relied on the fact that the Spanish government had no property (in the sense of ownership) in the Cristina, whereas in *The Parlement Belge* (5) the Belgian government was the owner of the mail-packet. The rule is not limited to ownership, however. It applies to cases where what the government has is a lesser interest, which may be not merely not proprietary but also not even possessory. Thus, it has been applied to vessels requisitioned by a government, where, in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign state, is subject to its direction, and employed under its orders. That was a separate ground in *The Porto Alexandre* (7), apart from the question as to whether, or the fact that, the vessel had actually become the property of the Portuguese government, which was possessing and employing her. A similar immunity from arrest was upheld in favour of the British Crown in *The Broadmayne* (1), a case where a vessel was requisitioned by the British government under what was in fact a compulsory charterparty and hiring. The government, it was held, could not be deprived by the order of the court of her services, nor could the court interfere with her so long as she was in the Crown's employment, though any rights against the owners not affecting the user by the Crown were preserved. This latter point does not arise in actions for possession, as contrasted with actions claiming a lien. Similarly in *The Jupiter* (8) no question of ownership of the vessel was involved. All that clearly appears from the report is that the vessel, being a Russian vessel, was in the possession, and subject to the control, of the Russian Soviet government, which claimed the right to possession under a master holding for it. A writ *in rem* for possession was set aside. The Court of Appeal obviously treated the facts as sufficient to bring the case within the rule which SCRUTTON, L.J., quoted from DICEY'S CONFLICT OF LAWS, 3rd Edn., at p. 215:

> The court has . . . no jurisdiction to entertain an action or other proceeding against any foreign sovereign. . . An action or proceeding against the property [of a foreign sovereign] is . . . an action or proceeding against such person.

In my judgment, on the facts of the present case, the requisitioning of the Cristina under the decree of June 28, 1937, gave the Spanish government a right or interest in the Cristina, whether called property or not, which was immune from interference by the courts of this country.

The Court of Appeal—rightly, as I think—treated the case as concluded in substance by *The Jupiter* (8). It has, however, been strenuously contended that the decision in *The Jupiter* (8) does not govern this case, because the requisition was there effected within the jurisdiction of the requisitioning state, whereas in the present case the Spanish government seized the Cristina in British territorial waters. It was said that such seizure constituted a wrongful act, which was a breach of international comity, and excluded a right to claim the reciprocal comity of immunity. The famous judgment of MARSHALL, C.J., in *The Exchange* (16) was also relied on as resting the immunity on a licence in favour of the sovereign state which brings its own property within the alien jurisdiction on the footing of the licence, whereas no such licence can be implied when the vessel has entered the jurisdiction in the owner's possession and has then been wrongly seized. It was also said that the judgment of the courts below, if upheld, would enable a foreign sovereign state to effect unlawful seizures in this realm of chattels or property without either the state itself or its agents being under any liability, civil or criminal. In my judgment, these objections are ill-conceived. I do not think that MARSHALL, C.J., had any such idea in mind when he referred to an implied licence under which the foreign vessel entered the jurisdiction. His expressions were apt in regard to the facts before him, but were not intended to limit or define the immunity, which follows, not so much from the fiction of a licence, as from the independent status in international law of the foreign sovereign. This gives the sovereign, so far as concerns courts of law, an immunity even in respect of conduct in breach of the municipal law. The remedy, if any, is *prima facie* by diplomatic representation or other action between the sovereign states, not by litigation in municipal courts. Whatever the consequences which in any particular case may follow from this immunity, it is too well-established in the law of this country to admit of being infringed. It must also be noted in the present case that the Cristina, even when in Cardiff docks, may have, as being a foreign merchant ship, a status different from that of an ordinary chattel on land. However, as the relevant fact here is that the Spanish government had in fact requisitioned her, there is no need to consider whether in any sense, or to any extent, she was subject, while in English territorial waters, to the law of her flag, or to the operation of the Spanish decree. Nor is it necessary, even if it be competent, for the court to debate whether the decree was validly made under Spanish law. I do not think that *The Jupiter* (8) admits of any solid distinction, because of the fact that the Jupiter was requisitioned within the territorial jurisdiction of the Soviet state.

A further point raised by the appellants was that the Cristina was a private merchant vessel employed in trading, whereas in *The Parlement Belge* (5) the Court of Appeal was careful to point out that the vessel was mainly used for carrying the mails, and that the carrying of passengers and merchandise was subsidiary; and it is said that the Court of Appeal in *The Parlement Belge* (5) would have refused to recognise the respondent's immunity in the facts of this case. The contention seems to be that the Cristina was a tramp-steamer which its owners had employed in ordinary trading and in the carriage of commercial cargoes, and that, in regard to such a vessel, the foreign sovereign state could not claim immunity on the ground of property or possession, nor could it claim immunity from being impleaded by an action *in rem* against the ship. It might be enough to say, in answer to these arguments, that the circumstances in which the respondent took possession of the Cristina, particularly in view of the recitals to the decree, sufficiently bring the

Cristina within the description of public property of the State destined to public use. This is the general criterion postulated by the Court of Appeal in *The Parlement Belge* (5), but that court never intended to lay down that a trading vessel must be deemed to be, as a matter of law, outside the sphere of immunity. The main contention of the plaintiffs in that case was that the immunity was limited to ships of war, and a few other types of vessels, such as royal yachts, transports, and a few others. It was no doubt in regard to armed ships of war that the immunity of ships was first recognised, as in *The Exchange* (16), but, as Sir H. S. Giffard, S.G., pungently pointed out in argument in *The Parlement Belge* (5), at p. 202:

> The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign courts.

Times, however, have changed, and the general principle must override the particular instance, and must be adapted to the new conditions. Indeed, the Parlement Belge might be fairly described as a commercial vessel, since mails are more often than not carried by private ships. In *Young* v. *S.S. Scotia* (12), the vessel held to be immune as a public vessel was a train-ferry, owned by the Crown, and to be employed to carry trains between two points on a railway owned by the government of Canada. In *The Jassy* (17), Sir Gorell Barnes, P., upheld the immunity in the case of a vessel which was the property of the state of Roumania, and employed for the public purposes of the state in connection with the national railways of Roumania. The most signal development of the principle, however, has been during the Great War, during which the importance to the state of trading vessels became fully realised. This development was most uncompromisingly expressed in a judgment of the Supreme Court of the United States in *Berizzi* v. *Pesaro* (18). That was an action *in rem* brought against an Italian ship for damages for failure to carry a parcel of silk shipped for carriage from Italy to New York. The ship belonged to the Italian government and was a general ship engaged in the common carriage of merchandise for hire. The court said:

> We think the principles [of immunity] are applicable alike to all ships held and used by a government for a public purpose, and that, when for the purpose of advancing the trade of its people or providing revenue for its treasury, it acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

This was in 1925. The court cited as recent authorities *Young* v. *S.S. Scotia* (12), *The Jassy* (17), *The Gagara* (4), *The Porto Alexandre* (7), and *The Jupiter* (8). This judgment seems to represent the impact of modern ideas on the doctrines of *The Parlement Belge* (5), but I cannot regard it as other than representing logical evolution. The decision of the United States court agrees with that of the Court of Appeal in *The*

Porto Alexandre (7), where the ship was one which had been requisitioned by the Portuguese government, and was being employed by them in the carriage for reward of ordinary commercial cargoes. The Court of Appeal held that the case came within the principle of *The Parlement Belge* (5). WARRINGTON, L.J., referred to *Briggs* v. *Light Ships* (19), where immunity was granted in respect of government lightships, and quoted the words of the Court of Appeal in *The Parlement Belge* (5), at pp. 212, 213, with reference to that case :

> The ground of that judgment is that the public property of a government in use for public purposes is beyond the jurisdiction of the courts of either its own or any other state, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property [the reason being] that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state.

In view of what I regard as the nature and purpose of the possession held by the respondent of the Cristina, it is not necessary to express a final opinion on the question, but, as at present advised, I am of opinion that these decisions of the United States Supreme Court and of the Court of Appeal correctly state the English law on this point.

This modern development of the immunity of public ships has not escaped severe, and, in my opinion, justifiable, criticism on practical grounds of policy, at least as applied in times of peace. The result that follows is that governments may use vessels for trading purposes, in competition with private ship-owners, and escape liability for damage, salvage and similar claims. Various international conventions have discussed this problem, and have culminated in the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, of Apr. 10, 1926. The general purport of the convention was to provide that ships owned or operated by states were to be subject to the same rules of liability as were privately-owned vessels. Ships of war, state-owned yachts, and various other vessels owned or operated by a state or government and non-commercial service were excepted. There was power for a state to suspend the operation of the convention in time of war. Great Britain, along with the majority of modern States, signed the convention, but has not yet ratified it or enacted any legislation to bring it into effect in this country. Even if the provisions of the convention were made law here, it is not clear that it would affect the position in the present case, because its effect is apparently limited to claims in respect of the operation of such ships, or in respect of the carriage of cargoes in them. Thus, it would affect claims *in rem* for collision damage, such as the claim in *The Parlement Belge* (5), or for salvage, as in *The Broadmayne* (1) and *The Porto Alexandre* (7), or for cargo damage, as in *The Pesaro's* case (18), but, it may be, not claims for possession, such as that in the present case, or *The Gagara* (4), or *The Jupiter* (8).

I may add that, in the present case, it is, in my opinion, sufficiently shown by the evidence before the court that the Spanish government had actually requisitioned, and taken possession and control of, the Cristina. That is all that is needed to justify the claim to immunity on the ground of "property." The question as to how far a mere claim or assertion by that government would be conclusive on the court does not arise here.

For the reasons which I have stated, the decision of BUCKNILL, J., and of the Court of Appeal was, in my judgment, on the materials of fact upon which the court must act, a decision which flowed inevitably from the application of the principles of international law, as recognised by the courts of this country. In my judgment, the appeal must fail.

LORD MAUGHAM: My Lords, the claim of the respondent, the government of the Spanish Republic, who entered a conditional appearance to the writ *in rem*, is based upon its immunity as an independent sovereign state. The facts are fully stated in the opinion of my noble and learned friend LORD WRIGHT, and it is unnecessary to repeat them at length. The appellants, the plaintiffs in the action, were at all material times, and still are, the sole owners of the Cristina. While it remained in their hands, it was a private vessel registered at the port of Bilbao. A decree was made in Spain on June 28, 1937, requisitioning all vessels registered in the port of Bilbao. The Cristina at that date was not within the territorial jurisdiction of Spain. She arrived at the port of Cardiff on July 8. On July 14, the respondent, by its agents—and, it should be mentioned, without a breach of the peace—took possession of the vessel. For the reasons given by your Lordships, I accept the view that since July 14 the respondent, by its agent, has been in *de facto* possession of the ship. The writ was dated July 22. According to a not unusual form, the defendants were "the steamship or vessel Cristina and all persons claiming an interest therein." The indorsement on the writ was a claim by the plaintiffs as sole owners of the ship "to have possession adjudged to them" of the same. There was an arrest of the vessel in due course. The respondent entered a conditional appearance on July 27, and moved to set aside the writ and arrest for the following reasons:

> That the steamship Cristina was at the time the writ in this action was issued the property of the government of Spain, a recognised foreign independent state, and that the said state declines to sanction the institution of these proceedings in this court.
>
> That at the time of the issue of the writ in this action the steamship Cristina was in the possession of the Spanish government by its duly authorised agent.
>
> That at the time of the issue of the writ in this action the Spanish Republican government had a right to the possession of the steamship Cristina.
>
> That this action impleads a foreign sovereign state—namely, the government of Spain.

The first reason has been abandoned. The respondent relied on the circumstance that, by a decree of June 28, 1937, it had purported to requisition all vessels registered in the port of Bilbao (including the Cristina), and by reason thereof it claimed that it was entitled to possession of the Cristina, and that it was therefore impleaded by the proceedings. It was alleged that the Spanish Consul at Cardiff had requisitioned the Cristina in pursuance of this decree, and that the Spanish government were in fact in possession of her through a new master appointed by the said Spanish Consul.

A BUCKNILL, J., and the Court of Appeal held themselves bound by authority to decide that the court must decline jurisdiction, on the ground that a foreign sovereign state—namely, the Republic of Spain—was asserting a possessory interest in the Cristina, and objected to the jurisdiction of the court. Hence the present appeal. If it were success-
B ful, the result would be that our courts would have to determine the legal effect in this country of the decree of June 28, 1937, as regards a ship under the Spanish flag which was not at that date within Spanish territorial jurisdiction. This question has not been argued, and I shall abstain from expressing any opinion on it, but it seems to me that the
C claim by the Spanish government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions *in rem* against vessels belonging to a foreign government and employed
D in the ordinary operations of commerce. For my part, I think that such a claim ought to be scrutinised with the greatest care. In these days, and in the present state of the world, diplomatic representations made to a good many states afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign government. More-
E over, the persons entrusted with the making of diplomatic representations cannot try an action. If a foreign government ship has been involved in a collision at sea, due, as alleged, to the negligence of her captain and crew, the foreign government has only to dispute liability to render further diplomatic correspondence a waste of time.

F My Lords, it is not in doubt that an action *in personam* against a foreign government will not be entertained in our courts unless that government submits to the jurisdiction. The rule was founded on the independence and dignity of the foreign government or sovereign, or, to use the language of the future LORD ESHER, M.R., delivering judg-
G ment in the great case of *The Parlement Belge* (5), at p. 207 :

> . . . the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority.

H This immunity, be it noted, has been admitted in all civilised countries, on similar principles, and with nearly the same limits. It had been by implication admitted in this country by the Diplomatic Privileges Act, 1708, passed in consequence of the taking of the Russian Ambassador from his coach and his imprisonment under the old law by a private suitor. The statute has always been regarded as merely declaratory of the common law. The settled practice of the court to take judicial notice of the status of any foreign government (and, it may be added, of its ambassador) was finally established in this House in the case of *Duff Development Co.* v. *Kelantan Government* (11). The present government of the Republic of Spain has been recognised as being an independent sovereign state.

The immunity of a foreign government and its ambassador as regards property does not stand on the same footing. The statute of Anne protects the goods and chattels of :

> the ambassador or other public minister . . . received as such . . . or the domestic or domestic servant of any such ambassador or other public minister.

It is clear, I think, that the property in the goods and chattels would have to be established, if necessary, in our courts before the immunity could be claimed. The ambassador could not be sued in trover or detinue, but, if the property were not in his possession, and he had to bring an action to recover it, I am of opinion that he would have to prove in the usual way that the goods were his property. Speaking for myself, I think that the position of a foreign government is the same. There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a government or an ambassador, or by one of his servants, would be sufficient to bar the jurisdiction of the court, except in such cases as ships of war or other notoriously public vessels, or other public property belonging to the state. DICEY ON CONFLICT OF LAWS, c. 4, r. 52, has been relied on in favour of another view, but his proposition, founded on existing authorities, was that " an action or proceeding against the property " of a foreign sovereign or an ambassador or his suite was for the purpose of the general rule " an action or proceeding against such person." He did not (as he showed in the notes to the rule) mean by this that an action against property *claimed* by such a person is beyond the jurisdiction of our courts. An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction, but there is no authority for the view that, if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Dicey's rule, he would, in my opinion, be bound to prove his title.

The result, so far, in my opinion, is that, whilst in this country no action can be brought against a foreign government or its accredited representative, or persons who may be described as belonging to his suite, still, if the foreign government (I need not further mention the other persons with a right to immunity) wishes to recover property in the hands of some third party, an action must be brought in the usual way, and there must therefore be a submission to the jurisdiction up to the judgment. Whether the government has by that submission sub-

mitted to execution for costs under the judgment on its property in this country is not yet settled: *Duff Development Co.* v. *Kelantan Government* (11), at pp. 810, 819, 822, 830. If the foreign government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in
A possession of property in this country, no action can be brought against it by persons claiming title to, or any interest in, such property.

I now approach one of the main questions involved in this appeal: what is the position as regards an action *in rem* in relation to a ship, lying in a British port or in British waters, which at the date of the writ
B happens to be in the possession of a foreign government? In the present case, two additional facts should be remembered: (i) that the Cristina, before seizure on behalf of the Spanish government, was an ordinary steamship employed in commerce, and (ii) that she was registered at Bilbao, and sailed under the Spanish flag.

C The leading authority in this country is the above-mentioned case of *The Parlement Belge* (5), decided in the year 1880 by JAMES, BAGGALLAY and BRETT, L.JJ., overruling SIR ROBERT PHILLIMORE. It related to a Belgian steam-packet, plying between Dover and Ostend, belonging to the Belgian Government, manned by commissioned officers, and
D employed to carry the mails as well as passengers and cargo. The trial judge, SIR ROBERT PHILLIMORE, had decided that the action would lie because the ship was employed in commerce. In the Court of Appeal, it was not in dispute that ships of war belonging to a foreign government are exempt from our jurisdiction, and the elaborate judgment delivered
E by BRETT, L.J., was devoted to a consideration of the principles on which immunity could properly be based in order to determine whether public ships could claim the same immunity. As I read the judgment, which largely followed the reasoning of a remarkable judgment of MARSHALL, C.J., in the Supreme Court of the United States of America in *The*
F *Exchange* (16), two things have to be established to found the immunity, (i) that to permit the action to proceed would be incompatible with the royal dignity of the foreign sovereign or government, and (ii) that the immunity was one universally recognised in foreign countries. I would myself prefer to say "almost universally" recognised, for a few excep-
G tions would not, I think, affect the matter; but I hold a strong opinion that the Court of Appeal was right in insisting as a condition of immunity on the adherence of other foreign governments to the same rule as to immunity. In relation to such a rule as the one now under considera-tion, the word "comity," whatever may be its defects in regard to other
H rules of private international law, has a very powerful significance. Neither justice nor convenience requires that a particular state should decline to grant justice to its own nationals who have been injured by ordinary commercial vessels belonging to foreign governments if those governments are not willing to extend a similar immunity to the similar vessels of the first state. Nor can anything much more absurd be

imagined than that, for example, England should decline to give legal redress against a Spanish trading ship belonging to that government while such an action would be allowed to proceed if the ship were found in port at Genoa, or indeed, for all we know, at Valencia.

Having thus laid down the principles, the judgment proceeds to deal with the question as to whether the Parlement Belge was within them. The conclusion was in these words, at p. 220 :

> The property cannot upon the hypothesis be denied to be public property ; the case is within the terms of the rule ; it is within the spirit of the rule ; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity.

My Lords, I cannot myself doubt that, if the Parlement Belge had been used solely for trading purposes, the decision would have been the other way. Almost every line of the judgment would have been otiose if the view of the court had been that all ships belonging to a foreign government, even if used purely for commerce, were entitled to immunity, and the same is true as regards the judgment of the Supreme Court of the United States of America. I must admit that some judges have taken another view, and the decision of the Court of Appeal in *The Porto Alexandre* (7) is a clear decision in a sense opposite to the opinion I have expressed. After much consideration, I can only express my own conclusion. The judgments in *The Porto Alexandre* (7) seem to me to have omitted any consideration of what I deem to be a vital point—namely, the fact that other countries, while they admit the immunity as regards ships of war and other public ships, have not been at all agreed that the same immunity ought to be granted to ships and cargoes engaged in ordinary trading voyages.

It is objected that an action *in rem* is one in which the foreign government, if in possession of the ship, or if it has an interest in the ship, is impleaded. That, I think, in a sense is true ; but I do not think many competent jurists are of opinion that in such a case anything more is sought, or at any rate can be obtained, than a remedy against the *res*. When Sir Robert Phillimore, equally distinguished as a judge in maritime and in international law, decided in *The Parlement Belge* (5) (contrary to his first opinion) that the proceeding *in rem* should proceed, he was not deciding that a personal remedy could be enforced against the King of Belgium. For my part, I can see no sufficient reason for not following, in the case of a state-owned vessel, being neither a ship of war nor in any true sense a vessel *publicis usibus destinata*, the decision of Sir Robert Phillimore. The effect would be that these state-owned ships would be treated as exceptions to the general rule to this extent, that proceedings against the ships themselves might be brought and prosecuted to a conclusion. Other exceptions are to be found in cases where proceedings are brought and continued for administration of a trust, or an estate, or for the winding up of a company, even though a foreign government is interested : *Morgan* v. *Lariviere* (20), at p. 430 ;

Re Russian Bank for Foreign Trade (21), at p. 769. Moreover, no court has yet held that a foreign government can object to an action against a company in which it owns a number of shares.

I hesitate to take the view that a requisitioning decree relating to all vessels registered in an important port, whether large or small, whether built for pleasure or profit, is itself sufficient evidence of an intention to devote the vessels to public uses. On the other hand, there are special circumstances in the present case. The government of Spain is engaged in civil war, and is entitled to take exceptional and drastic measures to defend itself. The ships mentioned in the requisitioning decree are Spanish ships. There may be public uses for any of such ships, *e.g.*, in carrying stores, munitions, men, orders, and the like, for the purposes of defence or attack. On the whole, I think that the circumstances of the case justify the inference that the Cristina is intended to be used for some of such purposes, and is therefore brought within the description *publicis usibus destinata*. She is, as already stated, in the possession of the Spanish government. On these grounds, I think that she is entitled to the immunity claimed, and this is sufficient to dispose of the appeal.

My Lords, I have indicated my unwillingness to follow what I must admit to be the recent current of authority in our courts as regards state-owned trading ships. In what follows I shall merely be indicating the opinion I have formed—one which I believe is shared by many judges, and by nearly all persons engaged in maritime pursuits—that it is high time steps were taken to put an end to a state of things which, in addition to being anomalous, is most unjust to our own nationals.

Half a century ago foreign governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and, in particular, hospital vessels, supply-ships, and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned. But there has been a very large development of state-owned commercial ships since the Great War, and the question as to whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp-steamer and to compete with ordinary shippers and ship-owners in the markets of the world ? Doing so, is it consistent to set up the immunity of a sovereign, if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country ? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country ? Is there justice or equity, or, for that matter, is international comity being followed, in permitting a foreign government, while insisting on its own right of indemnity, to bring actions *in rem* or *in personam* against our own nationals ?

My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by business men, and with practical unanimity they are of opinion that, if governments or corporations formed by them choose to navigate and trade as shipowners, they ought to submit to the same legal remedies and actions as any other shipowner. This was the effect of the various resolutions of the Conference of London of 1922, of the Conference of Gothenburg of 1923 and of the Genoa Conference of 1925. Three conferences not being deemed sufficient, there was yet another in Brussels, in the year 1926. It was attended by Great Britain, France, Germany, Italy, Spain, Holland, Belgium, Poland, Japan and a number of other countries. The United States explained their absence by the statement that they had already given effect to the wish for uniformity in the laws relating to state-owned ships by the Public Vessels Act, 1925. The Brussels Conference was unanimously in favour of the view that in times of peace there should be no immunity as regards state-owned ships engaged in commerce, and the resolution was ratified by Germany, Italy, Holland, Belgium, Esthonia, Poland, Brazil and other countries, but not so far by Great Britain.

It must not be supposed that all the countries attending the conferences to which I have referred were bound by their municipal laws to grant the immunity in question. There is no doubt that the practice as to the immunity of state-owned merchant ships has been, and still is, far from uniform. France and Belgium, for example, grant only a limited immunity, and Italy grants no immunity at all. I have not been able to ascertain the position taken up by Spain. The Soviet Republic has apparently adopted the admirable practice of owning its merchant ships through limited companies, and does not claim—even if it could, which, for my part, I should doubt—any immunity whatever in relation to such ships.

I should add that it appears that the United States courts still adhere to the practice of granting immunity to foreign state-owned ships engaged in commerce. The United States statute above-referred to permits (sect. 1) actions to be brought for damages :

> caused by a public vessel of the United States and for compensation for towage and salvage services including contract salvage rendered to a public vessel of the United States.

This, it will be noted, does not refer in terms to state-owned vessels engaged in trade, but in other respects it extends much further than many countries would be prepared to go, and sect. 5 of the statute gives a right of action under the Act to nationals of a foreign government only if it is proved that such government "under similar circumstances allows nationals of the United States to sue in its courts." It would seem that the legislature of the United States, like that of all, or nearly all, other civilised countries, is disposed to the view that the immunity of state-owned private vessels ought not to be continued.

Numerous other points were ably argued for the appellants, and I have not dealt with them only because I am unable usefully to add anything on those points to what has fallen from my noble and learned friend LORD WRIGHT. I concur in the proposed motion.

Appeal dismissed with costs.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants); *Petch & Co.* (for the Spanish Republican government).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

REES *v.* POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Farwell, J.), **February 11, 14, 1938.]**

Workmen's Compensation—Industrial disease—Workman recovered but liable to a relapse—Whether still incapacitated.

A certifying surgeon certified that a workman, who had been suffering from miners' nystagmus, had wholly recovered, and was fit for his ordinary work, but he also added that, should the workman do so, he would be very liable to a relapse. In response to questions by the judge, the surgeon stated that the relapse would be a recrudescence of the disease, and might be expected to occur within six months of the man's resuming his work:—

HELD: in view of the liability to a relapse, the man was still partly incapacitated.

[EDITORIAL NOTE. The liability to a recrudescence of the disease may be slight, in which case a declaration of liability will meet the case, or it may be that the recrudescence of the disease is practically certain to occur within so short a time that the workman is wholly prevented from following what has been his occupation. In the latter case the workman is entitled to compensation in respect of partial incapacity. What is the exact position is a question of fact for the county court judge, and his decision will not be disturbed by the Court of Appeal so long as there is evidence to support it. The present case carefully considers the relevant authorities upon the point.

AS TO RECURRENCE OF INDUSTRIAL DISEASE, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 183, para. 394; and FOR CASES, see DIGEST, Vol. 34, pp. 469-471, Nos. 3838-3846. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 543-547.]

Cases referred to:

(1) *Starkey* v. *Clayton & Sons* (1925), 18 B.W.C.C. 346; 34 Digest 470, *3842*; 133 L.T. 612.

(2) *McNicholas* v. *West Leigh Colliery Co., Ltd.* (1933), 26 B.W.C.C. 29; Digest Supp.

(3) *Richards* v. *Goskar*, [1936] 3 All E.R. 839; Digest Supp.; 29 B.W.C.C. 357.

APPEAL from a decision of His Honour JUDGE CLARK WILLIAMS, K.C., at the Pontypridd County Court, dated Oct. 20, 1937.

The facts and arguments in the case are stated in the judgments.

J. Alun Pugh for the appellants.

Maxwell Fyfe, K.C., and *Joshua Davies* for the respondent.

SLESSER, L.J.: On July 6, 1936, a certificate by the certifying surgeon under sect. 43 of the Workmen's Compensation Act was given to one Daniel Rees to the effect that he was suffering from a disease known as miners' nystagmus. On that certificate, the employers paid the man half of the difference on the basis of partial incapacity which was produced by his condition of miners' nystagmus, which was 10*s.* 10*d.* per week, and they paid that 10*s.* 10*d.* per week from July 6, 1936, until Oct. 26, 1936. On Nov. 3, 1936, the employers, through their general manager, applied under sect. 19 (2) for an examination of this man by the medical referee, and the medical referee, Mr. Coulter, on Nov. 14, 1936, made a report in the following terms:

> The condition of the said Daniel Rees is as follows: I was unable to find any sign or symptom of miners' nystagmus after he had remained in a dark room for half an hour. He has wholly recovered from miners' nystagmus, and is fit for his ordinary work, but if he does so he will be very liable to a relapse. (2) The incapacity of the said Daniel Rees has ceased.

As the result of an application for arbitration by Daniel Rees on this matter, the certificate of the medical referee came before the county court judge, who was not very clear as to its meaning. He found it to be ambiguous, and, speaking for myself, particularly having regard to the phrase "liable to a relapse," and the matters which have to be considered on the exact meaning of that phrase, I think that he was perfectly justified in doing what he proceeded to do—namely, to send the certificate back to the medical referee for further elucidation. The medical referee was, therefore, asked certain questions by the county court judge as follows:

> (1) Whether the relapse mentioned in the certificate of the medical referee dated Nov. 14, 1936, if and when it occurs, will be (*a*) a recrudescence of the former attack of the disease, or (*b*) a fresh attack.—A recrudescence.

The second question does not arise. The third question is:

> How soon is it to be expected that the anticipated relapse will occur after the resumption of underground work?—Six months.

Reading that answer into the original certificate, as I think that the county court judge was entitled to do, the result at which he arrived, and, I think, properly, was that the certifying surgeon had said that the man was wholly recovered from miners' nystagmus and was fit for his ordinary work, but that, if he did return to his ordinary work, he would be very liable to a recrudescence of the former attack of the disease, which recrudescence would occur in six months of the resumption of underground work. That is a summary of the medical certificate as explained by the medical referee.

On that certificate, the county court judge had to consider whether or

not he should treat this man as partially incapacitated. He came to the conclusion that the man was still incapacitated. After reviewing the authorities, he said: "I accordingly find the workman to be still incapacitated." He went on to make an award continuing the 10*s.* 10*d.* per week. If that finding of fact that the man be still incapacitated cannot be
A impeached in law, it stands, and this appeal must necessarily fail.

The county court judge, so far as the law is concerned, seems to have followed the view expressed by this court in the case of *Starkey* v. *Clayton & Sons* (1). The material facts were that a man who had been a baker for 50 years contracted dermatitis in 1923. He recovered, and on
B Aug. 11, 1924, he was employed by the respondents, and again suffered from dermatitis, and was so certified, the date of the disablement being Aug. 27, 1924. Then he received compensation until Feb. 7, 1925, when the respondents' doctor reported him to have recovered, and compensation was stopped. Then the workman started arbitration proceedings,
C and the county court judge found that, on the medical evidence given at the hearing on Mar. 19, the appellant had entirely recovered from the attack of dermatitis, but that, if he returned to the same class of work, he would probably get the disease again. He therefore further found that the man was incapacitated for work in the particular trade of baking,
D and that there was a very real loss to him owing to this industrial disease. He went on to say that a man who had completely recovered from a disease could not be said to be "suffering" from a disease. That question, whether, though there was a finding that the man had entirely recovered from the disease, he could still be said to be suffering from it,
E was considered in this court. SIR ERNEST POLLOCK, M.R., points out in his judgment, at p. 352:

> The county court judge has not applied his mind to the question whether or not a recurrence of the disease was due to the man's own idiosyncrasy or due to the fact that he had already suffered from the disease.

F Then he goes on to point out that he does not think that the county court judge was necessarily right when he came to the conclusion that the man was not then suffering from the disease because he had recovered, and the case was sent back to the county court judge to inquire, as indicated by the Court of Appeal, whether or not the suffering from
G the disease included the probability of its recurrence, and on that basis to find whether the man was still suffering from the effects of a disease which prevented him from working at his trade, or whether the risk of recurrence of it was due to the fact that he had already suffered from the disease. On that, if he did so come to the conclusion, it was open
H to him, in the view of the Court of Appeal, to award compensation on the basis of partial incapacity. WARRINGTON, L.J., came to the same view, and ATKIN, L.J., whose judgment has been most canvassed in this appeal, says, at p. 355:

> If he is suffering from a risk of recurrence of the disease owing to his already having suffered from the disease, then that is such a disablement as is the effect

> of the industrial disease. It is, therefore, too narrow a view in these circumstances to say he has merely to consider whether at the time of the consideration of the matter there is in existence dermatitis or not. He ought also to consider whether the risk of a recurrence of the disease is itself a result of the disease from which he has been certified to be suffering.

The facts of that case were clearly treated by the Court of Appeal as being such that, if the county court judge were to come to the conclusion that there was a probability of recurrence, it would be open to him to award compensation on the basis of partial incapacity. Indeed, I do not think that in that case the question of declaration was ever considered by the court. It was treated entirely on the basis that, if the man had been suffering from the disease and there was the probability of its recurrence, it was open to the county court judge, if he thought fit, to give compensation on the basis of partial incapacity. The basis upon which he could give it would be that he would have to come to the conclusion, in order to justify compensation on the basis of partial incapacity, that in fact the probability of the recurrence of the disease, if the man continued in his own occupation, was such that he was satisfied as a fact that the man was then incapacitated in his own occupation, which he was unable to pursue because of this disease, because, although at that moment he was able to do it, the probability of a recurrence was such that in fact the incapacity would continue. That such a finding may be very reasonably held is apparent, I think, if one takes a case where the evidence goes to show that within almost a negligibly short period the man will be again incapacitated. If Mr. Pugh is right, and there was once a finding that by a particular time he is once more able to take up his occupation —in this case as a miner—a medical certificate to the effect that next day he would inevitably be again incapacitated from going into the mine would prevent the man from being able to persuade the county court judge to find that on that particular day he was at that time partially incapacitated.

On the findings of this particular case, the county court judge has said:

> Given a prospect of a fairly prolonged period of employment before any serious recurrence of the disease need be expected, it would seem from *McNicholas's* case (2) that the workman may fairly be regarded as having recovered his capacity for his old work.

That is to say, there may be cases where the period of employment before a recurrence need be expected may be so great as to justify the county court judge in coming to the conclusion that, at the time when the compensation has been stopped by reason of the man being held not to be then incapacitated, he may fairly be held to have recovered his capacity, and the county court judge has held that he was not at that time incapacitated. Then he discusses the contrary case. He says:

> but to me it seems that to require a workman to resume, or to hold him fit to resume, an employment in which he must anticipate a breakdown within six months is unreasonable, and for this reason I regard the referee's qualified finding of fitness in the present case as being in truth a finding that the workman is unfit to resume his old work.

The county court judge there has put very clearly the principle which, I think, is the right one—that it is, upon proper evidence, entirely a question of fact for him, and a question of degree, as to whether the estimate of his further incapacity, by reason of recrudescence, is so unpropitious that it is almost certain that within a reasonably short time
A the man will again be incapacitated, or whether, upon the other hand, the possibility of incapacity is so vague or so uncertain that, in the opinion of the county court judge, he may fairly be regarded as having his capacity for his old work. It is interesting to observe that in *Starkey* v. *Clayton & Sons* (1), which, I think, is still good law, the actual finding of fact
B by the county court judge, although he misdirected himself in law, was that, if the workman returned to the same class of work, he would probably get the disease again, and the Court of Appeal appear to have thought in that case that there was sufficient material for the county court judge so to find as a fact, if he thought fit so to do.

C In the present case, I think that the medical evidence is less propitious, because it says that, if the man returns to his ordinary work, he will be very liable to a recrudescence of the former attack, and that the recrudescence will occur after six months' resumption of underground work. That is less propitious than was the certificate in the case of
D *Starkey* v. *Clayton & Sons* (1).

Finally, I want to say a few words about the case of *McNicholas* v. *West Leigh Colliery Co., Ltd.* (2), which was much relied upon by Mr. Pugh. It is not necessary, in my opinion, to recite the facts of this case. It is sufficient to say that, when the matter came before the county court
E judge on the first occasion, on Mar. 3, 1931, the medical referee had already certified that the man was not suffering from nystagmus, that he was fit for ordinary work, and that no incapacity existed. Later on, in 1932, certificates were given by medical men who reported that he was then suffering from nystagmus, and the arbitration took place on
F July 15, 1932, after these further medical reports had been given, when the county court judge sat with the medical referee as assessor who had given the certificate on Mar. 3. He had made a personal examination of the workman, and he advised that there was then no nystagmus, but the county court judge made an award for the workman for 6*s.* a
G week from Mar. 17, 1931, and the employer appealed. When the matter came before this court, this court found it necessary, as the county court judge did in the present case, to have a further explanation, and they particularly wished to know whether the certificate of the medical referee, dated Mar. 3, 1931, did mean that there was any risk of a recrudescence
H of the nystagmus. He gave an affirmative answer to the following question:

> Is there or is there not a probability of a recurrence of nystagmus owing to the fact that the original conditions caused by the first attack have not completely passed away?

Then on that award LORD HANWORTH, M.R., points out, at p. 35:

> Putting those further answers together with the certificate it seems to be quite

> plain that on Mar. 3, 1931, the man was not suffering from nystagmus; his incapacity was non-existent:

He points out that the employers, not unnaturally, say that they are not liable to pay the 8*s*. a week, which was the sum which the county court judge had awarded, and he adds, at p. 35: A

> We have indicated that it seems to us a case in which a declaration of liability ought to be made . . . .

That is to say, there had been, before the county court judge, no ground at all for making an award to date back to Mar. 3, 1931, because the medical referee in Mar., 1931, had said in terms that the man was not B suffering from nystagmus, and was fit for ordinary work, and that no incapacity existed. The county court judge there found incapacity on no evidence at all, and, when the matter came to this court for the first time, it was said that there was a danger of recrudescence, and on that danger this court decided to give a declaration of liability. C That would be the case if, in the present case, the county court judge had found that there was incapacity in the face of a certificate by a medical referee containing the simple and plain statement that the man was no longer incapacitated, without any reference to recrudescence or the future at all. Myself, I do not see that that D case is in any way inconsistent with the case of *Starkey* v. *Clayton & Sons* (1). In that case, it was held that there was no evidence before the county court judge that the man was incapacitated. In *Starkey* v. *Clayton & Sons* (1), it was held that, although the county court judge had found that the man had recovered, he also held that he would get E the disease again, and there was evidence to that effect, and on that it was for the county court judge to decide whether that probability was so serious as to amount, in his view, to a finding of present incapacity, or whether it was so uncertain or remote that he would be contented to grant a declaration which, as I say, is entirely a question of F degree. I find nothing in the judgment which I gave in that case, where I endeavoured to point out the facts, or in the judgment of ROMER, L.J., which was approved in the House of Lords, so far as the passage relied upon is concerned, in the recent case of *Richards* v. *Goskar* (3), to throw any doubt on the correctness of the decision in *Starkey* v. *Clayton & Sons* (1). G The passage which LORD ATKIN quotes from *McNicholas* (2), at p. 375 of *Richards* v. *Goskar* (3), where LORD ATKIN says that in *McNicholas's* case (2) the medical referee had given a certificate which showed, as stated by LORD HANWORTH, M.R., that at that date he was not suffering from nystagmus, and that his incapacity was non-existent, H and the passage which was quoted from ROMER, L.J., deal with whether the disease is entitled to be treated as the injury and not the disablement, and really deal with a different subject-matter. As has been pointed out, however, there is no criticism of anything which is said there.

Finally, I come to this matter. Mr. Pugh points out that LORD

Hanworth, M.R., in *McNicholas's* case (2) does mention the judgment of Atkin, L.J., in *Starkey* v. *Clayton & Sons* (1) at p. 37, where he says :

> An illustration of that is to be found in *Starkey* v. *Clayton & Sons* (1), where the headnote says that " the words ' suffering from a disease ' include suffering from the effects of a disease, including the probability of its recurrence." But I think my judgment in that case makes plain that when you are regarding the statute it is not merely the disease but also the disablement which must be cognizable. It is suggested that Atkin, L.J., took a different view. I do not think so if his words are looked at on p. 355. He was dealing with a case in which there was disablement.

I take that to mean that he was dealing with a case in which the judge ought to have found, if he took the view, that, if there was recurrence, there was disablement. He continues :

> " The right view," he says, " depends on whether the disablement results from the accident, namely, the industrial disease, and if so in what respect a man is still suffering from the disease, if he is still suffering from the effect of the disease which causes his disablement." Then he goes on to use the passage : " If he is suffering from a risk of recurrence of the disease owing to his already having suffered from the disease, then that is such a disablement as is the effect of the industrial disease."

Then Lord Hanworth, M.R., adds at pp. 37, 38 :

> He must mean there where by reason of this risk the man was disabled to the extent that there was a proof given and established that he had lost some sum by reason of this disablement consequent upon the disease. . . . as I have said, we have not got the evidence of loss of money . . .

I cannot help thinking that that reference that he had lost some sum must be read to mean that he would lose some sum. It cannot, in my opinion, be taken to refer to the past, which I think would be irrelevant to any question which had to be considered. Speaking for myself, I prefer to think that some misreporting has crept into this report, because I cannot think that Lord Hanworth, M.R., would have relied upon what I think must be taken to be an irrelevant consideration, and the further phrase, " we have not got the evidence of loss of money," would, I think, be quite compatible with what Lord Hanworth, M.R., was saying—namely, that in that case there was evidence that this man would lose money by reason of the recurrence, in that he was so incapacitated that he would be immediately afflicted with the disease again. If that view be not correct, then I confess that it does not assist me to consider the problem which we have to consider here, because the whole problem here, rightly considered, is a very simple one. The arbitrator has to consider what is the present condition of the man—is he incapacitated, or is he not ? In taking into account his condition, he may have regard to the fact that, although at the time of the arbitration he is fit for his work, there is a danger of recurrence, and the question as to whether that recurrence is so near that it produces a present incapacity or whether it is so remote or uncertain as to support a declaration of liability seems to be a question of degree and a question of fact, and, despite Mr. Pugh's argument, I do not think I am laying down any new law at all. In my opinion, this appeal fails.

Scott, L.J. : I agree. In my view, the county court judge's judgment is open to no attack of error in law. I think that he has applied the law correctly and that his finding of fact is binding on us. I therefore concur that this appeal should be dismissed.

Farwell, J.: I agree, and I want to add only a very few words. Reading from the judgment of Romer, L.J., in *McNicholas's* case (2), and continuing from where Slesser, L.J., left off reading the judgment, I think, if I may say so with great respect, that Romer, L.J., stated exactly the position which has to be considered in this case, because he says, at pp. 44, 45:

> . . . he is still suffering from his disease in the sense that he is still liable to a recurrence of nystagmus, not by reason of any idiosyncrasy of his, but by reason of the fact that he did suffer the accident in Apr., 1928. That being so, the workman is entitled to be compensated if by reason of that continuing injury he is totally or partially incapacitated. If he be neither totally nor partially incapacitated, but the injury still continues, as it does continue because the disease still continues, but there is a reasonable probability that in the future he may suffer incapacity, then he would be entitled to a declaration of liability.

As I understand what Romer, L.J., is saying there, it is that, if the man has suffered an accident, or has acquired the disease, which is, in effect, an accident, and he is in such a condition that he can still earn his living in his business, but there is a probability of a recurrence of the disease, then he is entitled to a declaration of liability, and no more. If, however, his condition is such that he cannot continue to earn his wages, then he is incapacitated, or partially incapacitated, and he is entitled to compensation.

The question in this case is, I think, purely a question of degree. Can it be said that a man who is now free from the disease, but who will, according to the medical referee's evidence, probably have a recurrence of it if he goes back to work within six months, is partially incapacitated? That is a question of degree, and it is a question which the county court judge has found in favour of the workman. I am not prepared to say that the county court judge was wrong in coming to his conclusion that a man cannot be expected to go back and resume his work if the result will be that within a comparatively short time he will have a recrudescence of the disease. That being so, I agree that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellants); *Furniss, Stephen & Co.*, agents for *Arthur J. Prosser*, Cardiff (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

EVANS *v.* CROSS.

[King's Bench Division (Lord Hewart, L.C.J., Branson and Humphreys, JJ.), **January 18, 1938.**]

Street Traffic—Driving round bend outside a white line—Whether "failing to conform to an indication given by a traffic sign"—Road Traffic Act, 1930 (*c.* 43), *ss.* 48 (9), 49.

The appellant was charged with having, as the driver of a motor car on a certain road where a traffic sign indicating the route to be followed by traffic had been lawfully placed, unlawfully failed to conform to the indication given by the sign, contrary to the Road Traffic Act, 1930, s. 49. The appellant drove the car on the outside of a white line round a bend of the road. The nearside wheels of the appellant's car ran along the white line continuously round the corner of the road, placing the whole of the car on the outside of the line. The justices convicted the appellant and fined him £1 :—

Held : as a white line is neither a "traffic sign" nor a "device" within the meaning of the statute, the appellant had not committed the offence with which he was charged, although he might be liable to prosecution for careless or dangerous driving.

[**EDITORIAL NOTE.** The difficulty in the present case was that the information was framed in the wrong way, having regard to the proper meaning of the words "traffic sign" in the Act. The proper procedure in such a case is to charge the offender with careless or dangerous driving.

As to Traffic Signs, see HALSBURY, Supp., Street and Aerial Traffic, para. 583 ; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 5c-31b.]

Appeal by way of case stated against a decision of the justices for Kirton and Skirbeck in the county of Lincoln. The facts are set out in the judgment of Lord Hewart, L.C.J.

N. R. Fox-Andrews for the appellant.

The respondent was not represented.

Lord Hewart, L.C.J. : This is a case stated by justices for Parts of Holland in the county of Lincoln, and arises out of an information preferred by the respondent under the Road Traffic Act, 1930, s. 49, against the appellant. The charge was that the appellant on a day in June, 1937, being the driver of a motor car on a certain road where a traffic sign indicating the course to be taken by traffic had been lawfully placed, unlawfully failed to conform to the indication given by the sign, contrary to the Road Traffic Act, 1930, s. 49. The justices convicted the appellant and fined him. The question for us is whether they came to a correct determination in point of law. The facts are simple enough. It was proved that on a Sunday evening in June there was a continuous white line round a corner named Burton Corner. The line was 5 ins. wide, and there was an arrow at each end. The appellant, who was driving a two-seater, pulled out from behind another car in front of him in order to overtake it, and, in doing so, the nearside wheels of the appellant's car ran along the white line round the corner so as to place the whole of the car outside the line. It was contended for the appellant that merely going over the white line was not in itself an offence. It was contended for the respondent that the white line was a traffic sign within the meaning of the Road Traffic Acts. The justices accepted the respondent's contention. They said :

> We were of opinion that in view of the words " signs or other devices " contained in the Road Traffic Act, 1930, s. 48 (9), and the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, regs. 20 (ii), 21 (i), an offence had been committed by the appellant under the Road Traffic Act, 1930, s. 49.

The Road Traffic Act, 1930, s. 48, provides :

> (1) Subject to and in conformity with such general or other directions as may be given by the Minister a highway authority may cause or permit traffic signs to be placed on or near any road in their area.

Subsect. (2) provides :

> Traffic signs shall be of the prescribed size, colour, and type except where the Minister authorises the erection of a sign of another character.

Then subsect. (9) provides :

> In this part of this Act, the expression " traffic sign," includes all signals, warning sign-posts, direction posts, signs, or other devices for the guidance or direction of persons using roads . . .

There follows sect. 49, which provides :

> . . . where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic, has been lawfully placed on or near any road in accordance with the provisions of the last preceding section, any person driving or propelling any vehicle who . . . (*b*) fails to conform to the indication given by the sign, shall be guilty of an offence.

In order, therefore, to bring what happened here within the scope of this part of the Act, it must be made to appear (i) that this line so painted on the highway was a " device " within the meaning of sect. 48 (9), and (ii) that it was a device indicating the route to be followed by traffic within sect. 49. In my opinion, the word " device " refers to things *ejusdem generis* with signals, warning sign-posts direction posts and signs, and it cannot be said that this painted line was a sign-post or sign of that nature.

When one turns to the regulations—and it is not immaterial to observe that they are entitled the Traffic Signs (Size, Colour and Type) Regulations —one finds that a large part of those regulations is occupied by diagrams exhibiting sign-posts. Reg. 2 provides :

> Subject as hereinafter provided, and subject to any directions which the Minister may give under the Road Traffic Act, 1930, s. 48, the traffic signs which a highway authority may cause or permit to be placed on or near any road in their area for the purposes specified in the schedule hereto shall conform as to size and type with the indications given in the diagrams set out in the said schedule.

The schedule, consisting of many pages, sets out such signs as, for example, cross-roads, crossing, level-crossing, bend, steep hill, school, road junction, and so on. By reg. 20, it is provided :

> Lines may be placed on roads for indicating . . . (ii) the course to be taken by traffic at road junctions, corners and curves . . ."

In my opinion, those lines so placed are not " traffic signs " within the meaning of the Road Traffic Act, 1930, s. 48, so as to expose a person who fails to observe them to penalties under sect. 49, but are intended to be, and are, helpful indications of the road which may best be followed. If it were desirable so to interpret the Act and the regulations as to bring the failure to observe a line of that kind within the penal provisions of A the Act, and if there was no other way of dealing with a real case where mischief might have resulted, one might be astute to find that those words covered such a case. It is obvious, however, that, when a person drives a motor car in such a way as not to conform to the provisions of the Act, he may be liable to prosecution for driving without due care B and attention, or even for dangerous driving. It is therefore unnecessary to put a strained meaning on these penal provisions, and it would be unreasonable as well as unnecessary. The justices sought to give an undue extension to these regulations, and the appeal must succeed.

C BRANSON, J.: I agree.

HUMPHREYS, J.: I agree.

Appeal allowed.

Solicitors: *C. W. Evans*, agent for *Nelson & Jackson*, Lincoln (for the appellant).

D [*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

NEALE *v.* RICHARDSON.

[COURT OF APPEAL (Slesser, Scott and Clauson, L.JJ.), **February 1,**
E **24, 1938.]**

Building Contracts—Payment by instalments when architect's certificate given—Arbitration clause appointing architect as arbitrator—Architect's decision to be binding in case of disputes—Refusal of architect to issue certificate or to act as arbitrator—Whether absence of certificate a bar to recovery.

F The plaintiff contracted to build a house for the defendant, for which he was to be paid by instalments when a certificate was given by the architect. In case of disputes, the architect was to act as arbitrator. A dispute arose, and the architect nominated a person other than himself to act as arbitrator. It being pointed out to him that the contract provided that he himself should be the arbitrator, he refused to arbitrate or to issue a certificate with regard to the final instalment. The defendant took no steps to appoint a new arbitrator, or to stay the present G action:—

HELD: it was the duty of the architect, acting as arbitrator, to decide whether the unissued certificate ought to have been issued. As he had failed to do this, the lack of a certificate was no bar to the plaintiff's right to recover the balance of money due.

H **[EDITORIAL NOTE.** Apart from fraud or collusion the issue of a certificate by an architect is usually a condition precedent to an action by the builder to enforce payment. In the present case, however, there was also a submission of disputes to the architect as arbitrator. If in such a case the architect refuses to act as arbitrator, the proper course for the building owner, if he wishes to resist an action by the builder, is to proceed to the appointment of a new arbitrator or to apply for a stay of proceedings in the action.

AS TO DISPENSING WITH CERTIFICATE, see HALSBURY, Hailsham Edn., Vol. 3, pp. 254-256, paras. 445-449; and FOR CASES, see DIGEST, Vol. 7, pp. 356-361, Nos. 94-112.]

Cases referred to:

(1) *Botterill* v. *Ware Guardians* (1886), 2 T.L.R. 621; 7 Digest 351, *78*.

(2) *Hickman & Co.* v. *Roberts*, [1913] A.C. 229; 7 Digest 353, *84*; 82 L.J.K.B. 678; 108 L.T. 436, n.

(3) *Kellett* v. *New Mills Urban District Council* (1900), 2 Hudson's B.C., 4th Edn., 298; 7 Digest 363, *126*.

(4) *Re Nott & Cardiff Corporation*, [1918] 2 K.B. 146; 7 Digest 340, *37*; 118 L.T. 487; *revsd.* on another point *sub nom.* *Brodie* v. *Cardiff Corporation*, [1919] A.C. 337.

(5) *Clarke* v. *Watson* (1865), 18 C.B.N.S. 278; 7 Digest 363, *125*; 34 L.J.C.P. 148; 11 L.T. 679.

APPEAL from a decision of His Honour JUDGE L. C. THOMAS at the Pontypool County Court, dated June 21, 1937. The facts of the case are set out in the judgments.

Joshua Davies for the appellant.

J. L. S. Hale for the respondent.

SLESSER, L.J.: In this case the plaintiff, a builder, sues the defendant for the balance alleged to be owing to the plaintiff by her in respect of work done and materials supplied in the construction of a house by the plaintiff for the defendant. The sum alleged to be due, after deducting the amount of alterations and money received on account, is £122 16*s*. 1*d*., of which the plaintiff claims £100 damages for breach of contract. The defendant disputes the plaintiff's claim, upon the ground that it was a term of the contract entered into between them that payments should be made only on an architect's certificate, and that there is no final certificate authorising the payment of the sum here in dispute. She also counterclaims for damages for omissions from the contract, and for bad workmanship, to the amount of £221 16*s*. 8*d*.

I refer at once to the general conditions of the contract between the parties, so far as they are here relevant. After providing that the work is to be completed within three months of the date of signing the contract —namely, Oct. 4, 1933—with provision that the builder may be allowed an extension of time provided the architect is satisfied as to the reasonableness of the cause, and provision for a penalty, the agreement provides, in cl. 3, to the following effect:

> No extras will be allowed, but should any alterations be made which will either increase or diminish the cost these will be valued by the architect and his decision shall be binding both on the owner and the contractor.

By cl. 8 it is provided:

> In all cases of dispute arising out of this contract the decision of the architect shall be binding on all parties.

By cl. 9 it is provided:

> Payments will be made as follows on the architect's certificate: quarter contract sum when first floor-joists are on, quarter when roof is on, quarter when plastering

is completed and the remaining quarter when all details have been completed and the plans, etc., returned to the architect.

The specifications of the work to be done and materials supplied are expressed to be to the satisfaction of D. C. Udell, architect, Pontypool. From time to time alterations were approved by the architect, beginning on July 4, 1933, and in all £470 was paid to the plaintiff on the certificate of Udell. From time to time complaints were made by the building owner with regard to door-furniture, brick sills, and other matters, and on Oct. 20, 1933, the plaintiff sent a bill to the defendant for £127 balance on contract, and some additional sums for extras. The house was passed by the sanitary inspector on Oct. 25, 1933, and subsequently the defendant was given possession of the house.

On Dec. 20, 1933, the plaintiff asked the architect, Udell, for his final certificate, who, apparently, there being certain disputes as to the work done and as to the alterations, suggested arbitration. On Feb. 2, 1934, the solicitors for the plaintiff asked the solicitors for the defendant for the balance of £122 16*s*. 1*d*., and in Mar., 1933, they again demanded the final certificate from Udell, the architect, who, after considering the matter, on Apr. 4, 1934, decided that the matter must be referred to arbitration, and nominated a Mr. Phillips, of Newport, as the arbitrator. At the same time he informed the defendant's solicitors of his decision. This act was immediately objected to by the solicitors for the plaintiff, who very properly pointed out on Apr. 5, 1934, that the agreement said that all disputes should be settled by the architect, which did not allow him to appoint someone else to settle them for him. They wrote to the same effect on Apr. 9. On Apr. 17, the architect answered, pointing out that the plaintiff had not completed the work to the architect's entire satisfaction, and that variations from the specifications had been made without written instructions, and again suggesting arbitration, but Mr. Udell wholly failed to deal with the contention of the plaintiff's solicitors that the architect had no power to appoint an arbitrator. As they said in their letter of Apr. 20 :

> you are the arbitrator yourself and must act accordingly, and you have no power to delegate your duty to someone else.

To this no answer was given, and on Apr. 2, 1934, the plaintiff's solicitors, writing to the solicitors for the architect, insisted on a certificate. Again there was a suggestion that the matter should be referred to an independent person, and, finally, after more appeals to the architect to reconsider his decision, and after a good many evasive replies, on Feb. 1, 1937, the solicitors to the architect wrote to the then solicitors for the plaintiff as follows :

> We are instructed by our client to inform you that your client has not completed his contract and our client cannot therefore grant you any further certificate.

On the hearing before the county court judge, it was argued for the defendant that, under the contract, the obtaining of the certificate was a condition precedent to payment, and, so far as the contract is concerned, I am of opinion that para. 9 does require such a certificate when it uses the language " payments will be made . . . on the architect's certificate as to the remaining quarter "—that is, the final certificate when all details have been completed and the plans returned to the architect. It is evident, I think, that, in so far as the parties were disputing about A alterations and the quality of the work and other matters, these questions would have to be decided before the actual sum on which the architect could certify the final payment was ascertained, but, in so far as, whether the matter was under cl. 3 as to alterations or as to other matters of dispute, in both cases the architect was himself to give the binding B decision, his persistent refusal to carry out his duties had produced a deadlock. In the language of the county court judge, he flatly refused to carry out his duties. The exceptions which are indicated in the authorities where the building owner had precluded himself from complaining of the want of the certificate are, first, where there has been C fraud and collusion (see *Botterill* v. *Ware Guardians* (1)) between the architect and the building owner, and, secondly, where the building owner has influenced the judgment of the architect (see *Hickman & Co.* v. *Roberts* (2)), neither class of which applies to the present case. The third, and more doubtful, case has been said to be where the building D owner knowingly takes advantage of the architect's misconduct (see *Kellett* v. *New Mills Urban District Council* (3)). In the language of Pickford, L.J., in *Re Nott & Cardiff Corporation* (4), the observations of Phillimore, J., in *Kellett's* case (3) may have been made upon the basis that the jury there thought that the defendants had been parties E to the unreasonableness of the engineer, and certainly the language of Phillimore, J., where he cites *Botterill's* case (1), which was limited to fraud and collusion, and *Clarke* v. *Watson* (5), where the exception is limited to cases of collusion, supports the view that the judge in *Kellett's* case (3) was not intending to do more than re-state that collusion would F be a ground for the plaintiff proceeding at law in the absence of a certificate, notwithstanding the general terms in which the judge seems to define collusion. On the other hand, according to the report, the jury seem to have found that the defendants, being aware of the refusal or delay of the engineer to certify, took advantage of it to refuse or un- G reasonably delay payment, so that the case, as reported, is a very troublesome one to understand.

On the whole, though with some hesitation, I think that it would not be proper, having regard to the whole current of authority, and, more particularly, to the case of *Hickman & Co.* v. *Roberts* (2), to extend the H grounds on which the absence of a certificate may be excused. I cannot see why in principle the defendant should not be entitled to stand upon her contract and say that she has undertaken to pay when, and only when, the architect gives his final certificate. In the present case, his real failure of duty was to refuse to arbitrate so that the final sum could be ascertained, but for this I cannot see that the defendant can in any way be held responsible. To say that a person by relying upon his legal rights has taken advantage of somebody else's failure of duty, in a case where there is no suggestion that he has prompted, or even acknowledged, that breach of duty, seems to me to be contrary to principle, and, A if *Kellett's* case (3) is to be taken to provide more than another example of collusion, respectfully, I find myself unable to follow it.

The county court judge in the present case appears to have found that the architect had colluded with the builder. This is to me unintelligible, in that the builder was constantly pressing the architect for his certificate. B The statement is twice repeated, and the reference to the fact that the architect is said to have told the builder what he was entitled to on his full claim leaves the matter beyond doubt. It is, of course, clear that no collusion between the architect and the builder could affect the matter. In the result, I think that the county court judge must be taken to have C held that the refusal of the architect to arbitrate or certify was sufficient to disentitle the defendant to rely upon the absence of a certificate. This, for the reasons I have stated, I think is wrong.

I pass next to consider cl. 8 of the agreement, which provides for the decision of the architect being binding on all parties in all cases of dispute D arising out of the contract. This clause, in my view, must be read in conjunction with the clause dealing with certificates, and may override it. This, I think, is the proper conclusion to be derived from the principles underlying the case of *Brodie* v. *Cardiff Corporation* (4). There it was provided that works could be ordered as extras only if the order was given by E the engineer in writing, but it was also provided that, in case any dispute should arise between the corporation, or the engineer on their behalf, and the contractor, such dispute should be referred to an arbitrator. The engineer, having given certain orders which the contractor claimed should be treated as extras, refused his written order, and the matter went to F arbitration. The arbitrator awarded that the items in question should be paid for as extras, notwithstanding the absence of written orders of the engineer. In the present case, the person who had the duty to give the final certificate, the architect, was the same person as the one named as arbitrator under cl. 8, but this fact does not affect the principle. In G *Brodie's* case (4), as is pointed out by LORD SHAW, at p. 362:

> Wherever a dispute is remitted to arbitration on admitted fact, it must be assumed that the fact admitted was not conclusive of the point to be determined, and that the arbitrator is free to make an effective award. . .

H Here, the question being as to whether or not the final certificate ought to be given, a dispute arose on which, under cl. 8, I think the arbitrator had power to determine that the certificate ought to have been given, and, if he had, the legal effect would have been, as their Lordships assumed in *Brodie's* case (4), as if it had been so given.

In the present case, it is clear on the facts that the arbitrator under the contract has refused to arbitrate, and the question of the builder's right to remuneration, in the absence of a final certificate, has failed to be determined. Following *Brodie's* case (4), an arbitration resulting in favour of the builder for a sum there determined would have enabled him to sue for his payment as if a final certificate for that amount had been granted and not wrongfully refused.

The defendant in her defence relies upon the absence of a final certificate, and takes no point that a new arbitrator might have been appointed by the court under the Arbitration Act, 1889, s. 5, nor has she herself applied under that section to have an arbitrator appointed in lieu of the architect who has refused to act, nor taken any steps to stay this action on the ground that the parties had agreed to submit their differences to arbitration. In these circumstances, I think that the plaintiff is not precluded from having the whole question determined in court, and that the judge was entitled, though for reasons different from those upon which he relied, to take seisin of the matter, and to refer the claim and counterclaim to the registrar for report. In the result, this appeal must be dismissed with costs.

Scott, L.J.: I have had an opportunity of reading the judgment which Slesser, L.J., has just delivered, and I agree that this appeal must be dismissed. The issue depends solely on a question of construction, which can be stated very shortly. Cl. 8 included within its scope as a dispute upon which the architect was to act as arbitrator and adjudicate all differences arising between the parties out of the contract and any dispute about a certificate either issued or refused by the architect under the contract; for instance, whether an issued certificate was for too much or for too little, or whether an unissued certificate ought to have been issued.

If this is so, it means that the parties had agreed that any such issue should be tried by the domestic tribunal, and that an action by either in the courts was liable to be stayed by the other under the Arbitration Act. If, however, the parties did not choose to enforce the domestic tribunal, or were prevented by the action of the agreed tribunal from doing so, the King's courts regained their full jurisdiction, and then the county court judge was entitled to decide the issue as to the certificate which the architect would have decided as arbitrator, had he acted as such. It follows, therefore, that, in the circumstances, the absence of the certificate was not an obstacle to judgment at the instance of the builder.

Slesser, L.J., has dealt fully with the authorities, and I shall not discuss them further except to say that I agree with his criticism of the judgment of the late Lord Phillimore when sitting as a judge of the King's Bench Division in *Kellett* v. *New Mills Urban District Council* (3).

Slesser, L.J.: I am authorised by Clauson, L.J., to say that he has had an opportunity of reading the judgments of SCOTT, L.J., and myself, and agrees that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Kinch & Richardson,* agents for *Lyndon Moore & Co.,* Newport, Monmouthshire (for the appellant); *Phœnix, Levinson & Walters* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

PHILIPPSON *v.* IMPERIAL AIRWAYS, LTD.

[COURT OF APPEAL (Greer, Slesser, and Clauson, L.JJ.), **March 2, 3, 1938.**]

Street and Aerial Traffic—Carriage by air—International carriage—Construction of contract—"High contracting party" to Convention of Warsaw—Carriage by Air Act, 1932 (*c.* 36), *s.* 1 (2).

A consignment note for the carriage of gold from England to Belgium by air was subject to general conditions of carriage based on the Convention of Warsaw. The conditions applied to both internal and international carriage. The Convention came into force on Feb. 13, 1933. Great Britain ratified on Feb. 14, 1933, but Belgium did not ratify until Oct. 11, 1936. The contract in the present case was made in Mar., 1935, and by the conditions international carriage included all carriage by air between places within the territories of the high contracting parties to the Convention of Warsaw:—

HELD: (i) international carriage within the terms of this contract was carriage between two countries which had accepted the Warsaw Convention, either by ratification or by accession. The present contract was, therefore, not one for international carriage, as Belgium had not at the date of the contract so ratified.

(ii) (GREER, L.J., dissenting) the term "high contracting party" was not confined to those parties certified to be high contracting parties to the convention by order in council made under the Carriage by Air Act, 1932, s. 1 (2). Such a certificate, though conclusive evidence of the matters so certified, was not exclusive.

Decision of PORTER, J. ([1937] 3 All E.R. 318), *affirmed.*

[EDITORIAL NOTE. In this appeal the decision of PORTER, J., has been affirmed, but the reasoning by which he arrived at that decision is dissented from. The first question is, in effect, the meaning of the term "High Contracting Parties" in the Convention itself, and this is rendered difficult of solution as these words are apparently used in different senses in the Convention itself. The second question is whether the certificate given under the Carriage by Air Act, 1932, s. 1 (2) is exclusive, and this is held not to be so. A country may therefore be a High Contracting Party although no such certificate has been given. If a certificate has been given, it is conclusive proof of the fact that the country is a High Contracting Party.

AS TO CARRIAGE BY AIR, see HALSBURY, Supp., Street and Aerial Traffic, para. 712; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 260a-260f. FOR THE CARRIAGE BY AIR ACT, 1932, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, p. 865.]

Cases referred to:

(1) *Grein* v. *Imperial Airways, Ltd.,* [1937] 1 K.B. 50; [1936] 2 All E.R. 1258; Digest Supp.; 106 L.J.K.B. 49; 155 L.T. 380.

(2) *Rhondda's (Viscountess) Claim,* [1922] 2 A.C. 339; 42 Digest 613, *137*: 92 L.J.P.C. 81; 128 L.T. 155.

(3) *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 42 Digest 633, *367*; *sub nom. Bell-Cox* v. *Hakes*, 60 L.J.Q.B. 89; 63 L.T. 392; *revsg.* S.C. *sub nom. Ex parte Cox* (1887), 20 Q.B.D. 1.

(4) *Hawkins* v. *Gathercole* (1855), 6 De G.M. & G. 1; 42 Digest 636, *394*; 24 L.J.Ch. 332; 24 L.T.O.S. 281.

(5) *Beck & Co.* v. *Szymanowski & Co.*, [1924] A.C. 43; 39 Digest 467, *925*; 93 L.J.K.B. 25; 130 L.T. 387; *affg.* S.C., [1923] 1 K.B. 457.

Appeal and Cross-Appeal from a decision of Porter, J., dated June 8, 1937, and reported in [1937] 3 All E.R. 318, where the facts and documents are fully set out.

Sir Robert Aske, K.C., and *W. L. McNair* for the appellants.

A. T. Miller, K.C., and *H. G. Robertson* for the respondents.

Aske, K.C.: A high contracting party in this contract means one who has agreed to the Convention of Warsaw. All the original signatories are high contracting parties. Both England and Belgium are. Where the words of a statute appear to be general, the courts may construe them otherwise. They may take account of circumstances and the intention of the legislature: *Rhondda's* (*Viscountess*) *Claim* (2), *Cox* v. *Hakes* (3). They must consider the objects of the Act: *Hawkins* v. *Gathercole* (4). This carriage was not covered by the Carriage by Air Act, 1932, s. 1 (2), because Belgium was not one of the parties mentioned in any order in council made under that Act.

McNair (following on the same side): If the defendants have contracted the plaintiffs out of their statutory 6 years' limitation, the contract must be clearly expressed: *Beck & Co.* v. *Szymanowski & Co.* (5).

Miller, K.C.; In *Grein* v. *Imperial Airways, Ltd.* (1), it was held that Great Britain was, and Belgium was not, a high contracting party. The conditions of this contract are to be read in the light of English law. [He was stopped by the court.]

Aske, K.C., in reply: *Grein's* case (1) was solely on the Act, and not on the general conditions of the contract.

Greer, L.J.: In this case, the judge who tried the preliminary points, which he was asked to decide in advance, had to interpret the contract, which is a contract of some difficulty. Having regard to the fact that both parties knew that there had been a Convention of Warsaw, they made a contract which, by the conditions that were imported into the contract, was applicable, so far as appeared by its terms, both to international carriage and to carriage that was not international. The parties came to deal with the question as to what should be the rights in reference to international carriage, and with reference to that there are two terms on the back of the consignment note, which this court must take to have been part of the contract between the consignor and the carrying company. Those terms are as follow:

> Carriage by air: The general conditions of carriage of goods are applicable to both internal and international carriage. These general conditions are based upon

> the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said convention. Combined transport: Combined transport (air-rail) is subject to the general conditions of air-rail transport of goods, which are based upon the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said convention and so far as concerns that part of the carriage which is performed by air.

Then comes liability :

> In all cases the liability of the air carrier for goods in his charge is limited to a maximum of 250 French francs per kilogram. Such liability exists only under the special circumstances specified in the general conditions of carriage above referred to. In particular the air carrier is not liable at all if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures . . .

I construe those clauses as meaning this : We who are parties to this contract know that there is to be found in the Convention of Warsaw something which will define international carriage. It is not open to them to contend that, if one looks at the general conditions and at the Convention of Warsaw, one will not find there anything which beyond controversy defines the meaning of international carriage. The whole basis of the contract between the consignor and the shipper of these goods, if I may use the term " shipper," is that there is a definition somewhere to be found in the Convention of Warsaw of what the parties to that contract mean by " international carriage." Looking, as I have done more than once, at the Convention of Warsaw for this purpose, it seems to me quite impossible to avoid the conclusion that in the Convention of Warsaw what was meant by " international carriage " was carriage between two countries who, either by ratification of, which was equivalent to authority in advance, or by accession to, the terms of the international agreement, had accepted that there was such a thing as international carriage. They did not mean by that, in my judgment, carriage between a country that had ratified, or had acceded to, the convention and a country that at the material time had neither ratified, nor acceded to, the convention. That seems to me to indicate that we ought to differ from the judge's first finding, or rather from the opinion expressed by him in the course of his decision, that, apart from the Carriage by Air Act, he would have decided this case in favour of the appellants. I think that he was wrong in that view.

I also take the view that, assuming his expression of opinion was right, the matter, as dealing with an English contract, is definitely decided by the Carriage by Air Act, 1932. I read that Act as intending to put an end to all contentions that may be put forward at any time as to which countries are to be regarded as countries to whom the convention applies. It is done by means of empowering the making of an order in council saying what countries are to be regarded as countries to which the Act applies. I agree with Mr. Miller's contention that there is necessarily involved in that Act a definition which excludes all countries which are not mentioned in the order in council, and for that reason also I agree that this appeal must be dismissed with costs.

With regard to the cross-appeal, I think that the contentions put forward by Mr. Miller are correct, that in any event the term as to the damages would apply, and that therefore the cross-appeal, if it had been necessary to consider it, would have succeeded, even though the appeal failed. For these reasons, I think that there ought to be no costs of the cross-appeal.

A

SLESSER, L.J.: This appeal is concerned primarily with an answer given by the judge to an agreed question in the following terms:

> II (*a*). Whether the carriage covered by the said consignment note was "international carriage" as defined by art. 1, para. 2, of the general conditions of carriage of goods referred to in the pleadings and hereinafter referred to as "the conditions"? B

The judge has answered that question in the negative. In my opinion, the judge was right in coming to that conclusion, but, in so far as I have the misfortune to differ from the reasons which he gives for coming to that conclusion, I think it right to state in my own language why I think that this appeal ought to be dismissed. The judge, as GREER, L.J., has C stated, has provisionally formed the opinion that, had this matter to be decided solely as a matter of construction of the Convention of Warsaw, which is stated in the conditions of carriage in this contract to be one upon which the general conditions are based, he would have thought, in his view—though, as he is careful to point out, it is not his final and concluded D opinion—that the phrase "high contracting parties" in that convention meant all the parties originally signatories, together with those who accede, as and when they accede. Such a conclusion, if it stood alone, and if it were a final conclusion, would necessarily have resulted in the answer to the question stated being in the affirmative, because it is E beyond dispute that both this country and Belgium, with regard to whose territories we are here concerned in connection with this transit, were countries who were original signatories to the Convention of Warsaw of 1929. The judge has, however, given another reason, and in his opinion a decisive reason, why he thinks that the question should be answered F in the negative. He thinks that the matter is decided by the Carriage by Air Act, 1932, s. 1 (2), and he deals with the matter in this way at p. 322:

> I have to decide what meaning the words bear in a contract, one of the forms G of which is in English, made in England, for the carriage of goods from London to Brussels, and, according to our system, to be determined according to English law. The English Act was passed in July, 1932, and came into force in May, 1933; the contract was made on Mar. 5, 1935. Whatever the original meaning "high contracting parties" bore in the convention as originally signed, I have to determine what meaning it bore in England, in an English contract, in Mar., 1935. In my opinion, it then, and in those circumstances, meant high contracting parties as defined in the English Act, and is confined to those parties declared by order in H council to be high contracting parties to the convention.

In fact, the orders in council, which stated what countries were to be deemed high contracting parties for the purpose of the Act, did not at the material time include the Kingdom of Belgium. Sir Robert Aske admits, therefore, that the Kingdom of Belgium was not a high contracting party within the meaning of the Carriage by Air Act, 1932. The reason why I have the misfortune to disagree with the judgment of the judge on this particular point is this. I do not read the Carriage by Air Act, 1932, s. 1 (2), as saying that His Majesty may by order in council from time to time certify who are not the high contracting parties to the convention, but only as saying that there is power to certify who are, and that that certificate shall be conclusive evidence of the matters so certified. In other words, were Sir Robert Aske to succeed in showing that in the Convention of Warsaw, as incorporated in the conditions of carriage by air in this contract, "high contracting parties" did mean, and did necessarily mean, as the judge seems inclined to think, the signatories to that convention, the mere fact that by order in council as on a certain date a party was to be deemed to be a high contracting party as on that date, for the certificate is only conclusive evidence of the matters so certified, would not preclude this construction of the contract: albeit that the Kingdom of Belgium was a high contracting party on a certain date, it might have been a high contracting party, within the meaning of this contract and the convention, which is to be read into the contract, before that date. For that reason, I do not think that the Carriage by Air Act concludes this matter, but I have come to the conclusion in agreement with GREER, L.J., that, on a proper construction of the contract itself, apart altogether from the Carriage by Air Act, 1932, the proper view is that the reference to the high contracting parties, which appears in the article mentioned in the question which has here to be considered, means such parties as have bound themselves by the appropriate machinery to be operative parties to the convention, and not merely persons who through plenipotentiaries have agreed to place that convention before their respective governments or sovereigns for ratification. The convention itself, which was concluded in French, but of which we have an English translation, treated for all purposes as an accurate translation, does undoubtedly contain language which is capable of different interpretations. It does appear that language is often used which seems at first to show that the phrase "high contracting parties" does mean, or may mean, the persons who are signatories to the convention itself. Thus, we find in art. 37 these words:

> As soon as this convention shall have been ratified by five of the high contracting parties. . . .

This by itself, if there were no further context to consider, would rather indicate that the high contracting parties were the persons who signed the convention, and that, when five of them had ratified, the convention could come into operation. There is other language which Sir Robert Aske has cited to us which might bear *prima facie* the same construction, but, on the other hand, apart altogether from the obvious intent of the convention, and the mischief to which it was applied, there is, I think, compelling language which lends one to a contrary conclusion. It is provided in this convention, first, in the clause which I have quoted namely, cl. (2) of art. 37—that the persons who are signatories to the convention may ratify within a certain time by a deposit of the ratifications, but also it is provided that certain persons, not signatories to the convention, may come into the ambit of the matters provided for in the convention by what is called accession. These acceding powers do not ratify, but become bound upon their accession. There are other articles, which I think are quite impossible to construe, dealing with powers who have come in by this method of accession after the signature of the convention on Oct. 12, 1929, or, at any rate, before Jan. 31, 1930. We are told that that considerable country, the United States of America, is one of them. Unless they are to be treated as high contracting parties, they are left in a most anomalous position. For example, art. 39 (1) provides :

> Any one of the high contracting parties may denounce this convention [by a certain machinery].

If Sir Robert Aske is right in his interpretation, the United States of America, who, being an acceding party, are not an original signatory, having joined this convention, are left without any means of denouncing it, which difficulty does not arise if " high contracting party " has the meaning which Greer, L.J., has assigned to it, with which I agree—that is, that it means parties who have effectively contracted by accession or ratification. Again, art. 40 says :

> Any high contracting party may, at the time of signature or of deposit of ratification or of accession, declare that the acceptance which he gives to this convention does not apply to all or any of his colonies, protectorates, territories under mandate. . . .

That seems to me in terms to take the view that at accession a person acceding may become a high contracting party—it says so in so many words. Then it is said by Sir Robert Aske that art. 40 deals also with the time of signature, which indicates that persons at the time of signature, apart from whether they ratify or not, may so declare that the convention does not apply. That difficulty does not trouble me. I think that the meaning is clear—that is to say, that, at the time when the convention is made, the matters which have to be placed before the ratifying power for ratification may from the very beginning, through a declaration on signature by one of the parties, who will become high contracting parties if they ratify, exclude certain colonies, protectorates and territories under mandate. Art. 40 makes it clear beyond any question that " high contracting party " may and does include a party who does accede after signature, and after, possibly, the ratification by the five powers which brings the convention into force. If that is so, it is, to my mind, entirely consistent with the sense and purpose of the convention. As Greer, L.J., has pointed out, there is made in the article a distinction to which we have here to pay particular attention. Art. 1 (2) as to international carriage is dealing, in the first place, with countries which have bound themselves by certain mutual rules and conventions, and is also dealing, in contrast with that, with countries which have not bound themselves in such a way, and with carriage within the area of a single country. If that be the view—that that distinction, which is a very important distinction, finds expression in England in the Carriage by Air Act, 1932, as a consequence of ratification, and no doubt, in the case of other countries that have honoured their obligations, similar legislation, ordinances or decrees have carried out their part—then the distinction becomes clear. On Sir Robert Aske's view, though, the most extraordinary results follow. Countries who signed the convention but did not ratify, and were therefore in no way under an obligation to be bound, would nevertheless be included in the definition given in connection with international carriage, whereas countries which had subsequently acceded, and which therefore had not been signatories, would be excluded from that definition. Such a view offends against common sense. If the language were such that it became necessary so to construe it, questions might have arisen as to what the result might have been. In my view, however, we are driven to no such absurdity. While it is not conclusive, I think that it is material, to observe, as Greer, L.J., pointed out during the argument, that, in the case of *Grein* v. *Imperial Airways, Ltd.* (1), where one of the places to be considered was within the territory of Belgium, there was no question raised but that Belgium at that time was not a high contracting party, though it had signed the convention, by reason of the fact that it had not ratified, or had not been so described in the order in council. It is true that that particular case, as Sir Robert Aske said, dealt with the question on the statute, but I read the observations of Greene, L.J., as going far beyond that. At p. 76 he says this :

> It was not considered useful to class as " international carriage " cases where the carriage begins in the territory of a state adopting the convention and ends in one which does not adopt it or *vice versa.*

I think that the view which was taken in that case indicates—to my mind, at any rate, though the point, I agree, was not argued—that the court has taken the view, without the assistance of argument, that the term " high contracting party," within the meaning of the questions which we have here to consider, refers to a country which has adopted, either by adoption of the original convention or by accession, the application of the rules which find expression, though with modifications, in the Carriage by Air Act, 1932.

For these reasons, therefore, I think that the result is that the judge was right, but I am in the unhappy position of disagreeing with both the reasons which he gives for his conclusions. As to these I think he was mistaken. I think that the contention of Mr. Miller is correct. As to the basis on which he founds his judgment, similarly I find myself unfortunately unable to agree, but Mr. Miller, who is here as respondent, is entitled to his judgment on any grounds which lead to that result.

Clauson, L.J. : I also am of opinion that this appeal must be dismissed. The first question that arises is one of construction of a few words in the general conditions of carriage of goods which are imported by reference into the contract of carriage between the parties to this action. I agree with the view as to the construction of that contract which has been expressed by Greer, L.J., and by Slesser, L.J. That point is sufficient to determine the result of the appeal. There is, however, another question upon which views have been expressed by my brethren, A and that is the question as to whether the court which construes this particular contract is bound to apply a particular meaning to the term "high contracting party," because in the Carriage by Air Act, 1932, a particular meaning of the term "high contracting party" is indicated. I find myself in the position on this point of being in agreement with B Slesser, L.J., and of being out of agreement with Greer, L.J., and the judge in the court below, but I wish to state particularly that, as the matter can be, and has been, decided on the first point, it is unnecessary to express a concluded opinion upon the second point. I wish further to say that, as at present advised, my opinion is, as I have indicated, that C this court is not bound by anything in the Carriage by Air Act, 1932, to place any particular interpretation upon the words in question in this particular contract.

Appeal dismissed with costs; no costs of the cross-appeal. Order of Porter, J., *varied. Leave to appeal to the House of Lords.* D

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants); *Beaumont & Son* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

E

GOWERS AND OTHERS *v.* LLOYDS AND NATIONAL PROVINCIAL FOREIGN BANK, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.), **March 2, 3, 1938.**] F

Bankers—Payment of pension—Receipt and certificate—Forged receipt—Liability of bank.

G., a retired officer in the colonial customs service and in receipt of a pension, from 1916 to 1926 collected his pension from the defendant bank, with which he had an account, coming to the bank in person. In 1926 G. changed his place of residence and thereafter collected his G pension by post through the defendant bank by means of receipt forms sent direct to him by the plaintiffs. The receipt form included a certificate that the pensioner was still alive. G. died in 1929 and from then up to 1935, when his widow died, the pension was collected by means of forged receipt forms, the certificates being duly filled up by an alleged medical practitioner. The certificate might be signed by the bank or H by a person of certain named categories including medical practitioners. The plaintiffs, the Crown Agents for the Colonies, then sued to recover from the defendant bank the amount so paid since 1929:—

Held: (i) the certificate not being signed by the bank, it did not amount to a warranty by the bank that G. was still alive, and the bank was, in the circumstances, entitled to rely upon the certificate as being true.

(ii) the money could not be recovered as money paid under a mistake of fact, as the bank had paid it away to a person whom they believed to be their principal, and the fact that they were mistaken in that belief was irrelevant.

Decision of LAWRENCE, J. ([1937] 3 All E.R. 55) *affirmed.*

[EDITORIAL NOTE. For the convenience of all parties the payment of pensions A was made through a bank, the bank receiving from the pensioner a receipt and a certificate of his being still alive. A pension having by fraud been collected from the bank after the death of the pensioner, this case considers the liability of the bank to the government department from which it had received the pension. It would appear that there is no liability on the part of the bank so long as it does not itself give the certificate.

B As TO MONEY PAID TO BANK BY MISTAKE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 838-840, paras. 1361-1363; and FOR CASES, see DIGEST, Vol. 3, p. 179, Nos. 330-333.]

Cases referred to:

(1) *Sheffield Corpn.* v. *Barclay*, [1905] A.C. 392; 1 Digest 663, *2778*; 74 L.J.K.B. 747; 93 L.T. 83.

C (2) *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L.T. 263; 1 Digest 678, *2888*.

(3) *Collen* v. *Wright* (1857), 8 E. & B. 647; 1 Digest 665, *2795*; 27 L.J.Q.B. 215; 30 L.T.O.S. 209.

(4) *Firbank's Executors* v. *Humphreys* (1886), 18 Q.B.D. 54; 1 Digest 658, *2752*; 56 L.J.Q.B. 57; 56 L.T. 36.

D (5) *Taylor* v. *Metropolitan Ry. Co.*, [1906] 2 K.B. 55; 1 Digest 672, *2837*; 75 L.J.K.B. 735; 95 L.T. 149.

(6) *Starkey* v. *Bank of England*, [1903] A.C. 114; 1 Digest 662, *2777*; 72 L.J.Ch. 402; 88 L.T. 244.

(7) *Jones & Co.* v. *Coventry*, [1909] 2 K.B. 1029; 3 Digest 177, *320*; 79 L.J.K.B. 41; 101 L.T. 281.

E

APPEAL from a judgment of LAWRENCE, J., dated May 7, 1937, and reported in [1937] 3 All E.R. 55. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

F. P. M. Schiller, K.C., *F. R. Evershed, K.C.*, and *S. E. Pocock* for the F appellants.

Sir Walter Monckton, K.C., and *Hon. Cyril Asquith, K.C.*, for the respondents.

Schiller, K.C.: When the bank presented these forms to the Crown agents, it had no principal. A person who acts as an agent warrants G that he has a principal. If in fact he has none, and damage results, he must make it good. This principle applies to any document that the bank may present as agent, and the contents of the document are immaterial. Indeed, the document having come into existence, apart from Gibson, no one except the bank could present it. [Counsel referred H to *Collen* v. *Wright* (3), *Sheffield Corpn.* v. *Barclay* (1), *Firbank's Executors* v. *Humphreys* (4).] This was money paid under a mistake of fact, and is therefore recoverable. The money could obviously have been recovered from the bank if it had remained in their hands. The fact that they wrongfully paid it away cannot be any defence for them. [Counsel referred to *Taylor* v. *Metropolitan Ry. Co.* (5), *Kleinwort, Sons*

& Co. v. *Dunlop Rubber Co.* (2).]. The bank dealt with the money received by crediting the current account and allowing it to be drawn upon by a forger, whom they honestly believed to be Mr. Gibson, or Mrs. Gibson acting upon his power of attorney.

Pocock: By presenting the document, the bank warranted that they had authority to collect. [Counsel referred to *Starkey* v. *Bank of England* (6).] When the bank got the money, obviously they could not do what they liked with it. They got it conditionally upon paying it to the proper person: yet all the time they were allowing this account to be operated upon by forged cheques. [Counsel referred to *Jones & Co.* v. *Coventry* (7).]

Monckton, K.C., was called upon only on the contention that this was money paid under mistake of fact: The money was in fact paid to the principal—that is to say, to the person who had set the collecting machinery in motion. There is no warranty by the bank. All that they say is: "We are being used by some person in the designated manner for the purpose of cashing this document." The bank indeed have a principal in this case—a principal who need not necessarily be a customer—for whom they have in fact collected the money, and into whose account they paid it. That was all that they had to do.

Schiller, K.C., in reply.

Sir Wilfrid Greene, M.R.: The Crown Agents for the Colonies are entrusted with the task of paying pensions to colonial officers who, on the termination of their service, become entitled to pensions. For the purpose of paying those pensions in a manner convenient to themselves and to the pensioner, they have a system which is, broadly, of this nature. They send to the pensioner, just before the time when the pension payment becomes due, a form of receipt. That form may be presented by the pensioner in person at the office of the Crown Agents, in which case, upon verification of his signature upon it, he is paid in the office, or it may be presented through a bank. In the present case, a pensioner of the government of Mauritius, named Gibson, lived in France. His bankers were the Paris branch of the defendants, Lloyds & National Provincial Foreign Bank, Ltd., and it was to them that he handed his receipts for collection. The way in which the money was collected was this. The receipt was sent by the defendant bank to Lloyds Bank in London as their agents, Lloyds Bank in London presented it to the Crown Agents, who instructed the Bank of England to make the necessary transfer to Lloyds Bank, who in turn transferred the money to Paris to the defendants, and they placed it to the credit of Gibson's account.

Gibson was married, and he had given a power of attorney to his wife, Mrs. Gibson, to draw upon that account. Gibson in point of fact died on Dec. 13, 1929, but this fact was not known to the Crown Agents, nor was it known to the defendant bank until some time in Mar., 1935, the widow, Mrs. Gibson, having died on Mar. 9. It then transpired that, during the whole of the period between the death of Gibson in Dec., 1929, and the discovery of that death, money had been paid on the footing of receipts sent in in the way I have mentioned by the Crown Agents and credited by the defendants to Gibson's account. The reason A for that was that the receipts, when sent in (and they were sent by post from Vichy for the most part), contained a cleverly-forged signature of Gibson's. They also contained a certificate, on the face of it purporting to be a certificate to the effect that Gibson was alive. I shall come to the terms of that certificate a little later. The bank, acting in perfect B good faith, presented the receipts in the usual way, and obtained payment. The receipts were sent to it by the person purporting to be Gibson in a letter, which followed, more or less consistently, the same form, and the letter contained instructions with regard to the application of the money. It was the practice of the bank, at any rate during the C greater part of the time, if not the whole of the time, to credit the account before it had actually received payment from the plaintiffs.

The sums so paid after the death of Gibson amount to some £3,500. They were dealt with in this way. I will read a summary of the facts with which Mr. Schiller agreed :

> D All money paid by the plaintiffs to the bank had been paid away by the bank before the issue of the writ, except about 900 francs. The bank dealt with the money received by crediting the account and allowing it to be drawn upon by a person whom they *bona fide* believed to be Mr. Gibson or Mrs. Gibson acting under her power of attorney.

Accordingly, the position at the date of the issue of the writ was that, E with the exception of the small sum of 900 francs, they had paid away the whole of the money received from the plaintiffs. In those circumstances, the Crown Agents commenced this action against the defendant bank, claiming repayment of that amount. I say "claiming repayment of that amount." That is not strictly accurate, because that was an F alternative claim. Their first claim was that they were entitled to recover from the defendant bank damages for breach of an implied warranty of authority, and, in the alternative, they claimed to recover the £3,500 on the ground that it was money paid under a mistake of fact. The judge rejected both contentions, and from his decision the G present appeal is brought.

Taking the first point first—that is to say, the question of implied warranty of authority—it is said by Mr. Schiller and Mr. Pocock on behalf of the appellants that the case falls within the well-known line of authorities which lays down a proposition to the effect that, where H a person purporting to act as agent makes a contract, or invites the doing of an act, if it turns out that he had no authority, either because he was not authorised or because the principal was non-existent, he is liable in damages to the person who has made the contract or done the act at his request, on the footing that there was an implied contract between them under which he gave such a warranty. The basis of the principle is stated in one short passage in the opinion of LORD DAVEY in *Sheffield Corpn.* v. *Barclay* (1), at p. 399, in which his Lordship says that, in such circumstances, "there is implied by law a contract."

Mr. Schiller says that, in handing the receipt, which on the face of it purported to be signed by Gibson, to the plaintiffs, the bank impliedly warranted that they were acting for a principal—to wit, Gibson—and A that Gibson was alive. He says that that implication arises quite irrespective of anything which appears on the face of the document.

It appears to me that that proposition really will not bear examination. It is a matter of general principle that implications do not arise where the circumstances are such as to negative the existence of any B implied agreement. The appellant's case rests on an implied contract, and, if the circumstances are such as to negative any such contract, the implication cannot arise. It is accordingly necessary to examine a little more carefully the circumstances, and, in particular, the relevant document, in order to see whether such an implication can possibly arise C in the present case. The document which comes to the hands of the collecting bank is a document prepared by the Crown Agents for the purpose of enabling payment to be made in a manner convenient both to themselves and to the pensioner. It is in the form of a receipt. The amount is filled in in the office of the Crown Agents, the name of the D payee is filled in, and there is a space left for the payee's signature and the date. In the margin are instructions as to the manner of presentation. There is, first of all, the sidenote dealing with the case where the receipt is presented in person—that is to say, presented in person at the office of the Crown Agents. It provides: E

> This form must be left one hour for examination if presented in person, and one day if presented through a bank.

Then there are directions that, if presented in person, the receipt must be signed in the presence of the paying cashier. Then, below the signature, there is something which is headed in large black type: F "Certificate." The note appended to that certificate is to this effect:

> To be signed in the United Kingdom by a justice of the peace, notary public, commissioner for oaths, minister of religion, medical practitioner, or by a manager of a bank or branch bank when passing on for payment. Abroad—by a British Consul or Vice-Consul, British chaplain, notary public, or by managers of branches of British banks when passing on for payment. G

The sidenote says:

> As indicated above the form must be presented in person at this office, or passed through a bank for collection. In the latter case this certificate must be completed.

The certificate is to the following effect: H

> I hereby certify that ——, whose signature is affixed above, is living, and to the best of my knowledge and belief is the person entitled to the payment.

Then there is a space for the signature and address, the qualification of the certifying individual and the date of the certificate. Those, I think, are the only parts of the document to which I need refer.

The first thing to notice about it is that the right to have this payment made through a bank is not confined to the case where the bank employed is the pensioner's own bank. He may not have a bank. Nevertheless, he is entitled under this document to obtain payment by the convenient method of getting a bank to present the receipt for him. Accordingly,
A on the face of the document it is contemplated that the bank which presents this to the Crown Agents will not necessarily be the bank of the pensioner, and may not necessarily know anything about him.

The next point to notice is that the certificate which must be filled up when the payment is made through a bank is a certificate which may
B be signed by any person occupying one of the positions indicated, and one of those positions is a manager of a bank or branch bank when passing it on for payment. It is accordingly contemplated that the bank which is going to present the receipt may itself, through its manager, give the required certificate.

C Bearing in mind that this is a document prepared by the Crown Agents themselves, the first thing to ask about it is: What does this document convey to the persons into whose hands it is intended by the Crown Agents to come? First of all, there is the pensioner himself. It is intended to convey to the pensioner that, providing he obtains the
D certificate filled up in the proper way, he can obtain payment through any bank which he chooses. It is, secondly, contemplated by the framers of this form that it will come into the hands of a collecting bank, and it is therefore important to see what it is that this document upon its face conveys to the bank. The position, I think, can be examined
E most simply by considering the case, which is contemplated, of a bank being asked to collect this money by a person who is a stranger to it, and consenting to do so for a commission. What does the document on its face convey to such a bank? It conveys quite clearly, as it seems to me, that the evidence of life, and the evidence of the authenticity of
F the signature, which the Crown Agents require, which is the only evidence which they require, is the certificate, filled up and apparently in order. The alternative proposition for which Mr. Schiller contends involves that the bank whose case I am considering, when a document of this kind is presented to it, with a certificate apparently in order, is bound
G at its peril, before it forwards the certificate to the Crown Agents, itself to ascertain the very matters with which the certificate deals. It must ascertain whether or not the pensioner is alive, it must ascertain whether or not the signature upon the document is really his signature, and I apprehend that it must ascertain whether or not the person who purports
H to have signed the certificate is in fact the person who signed it, and that he held the necessary qualification. That last observation it is perhaps not necessary to import into this discussion. The essential thing is that, according to Mr. Schiller's argument, the existence, identity and signature of the pensioner are to be vouched for by the bank.

It seems to me quite impossible to extract from this document, intended to be used in the way in which it is intended to be used, evidence of any such obligation upon the bank. Among other things, it would completely destroy the business efficacy of the machinery provided, because it would entail that a person who had not a banking account, living, perhaps, in a remote place, and desiring to collect his money through a bank, could only get the bank to do it if he himself were to bring to the bank the necessary proof of his identity, his signature, and so forth. That would cause the whole machinery to break down. I read this document as, on the face of it, conveying to the mind of any collecting bank that the Crown Agents will honour the document provided that it is presented by a bank, with the certificate, apparently regular upon the face of it, duly filled up, and that it is upon that certificate, and that certificate alone, that the Crown Agents will rely with regard to the matters dealt with therein.

There is one further point. As I have mentioned, one of the persons qualified to give a certificate is the manager of the very bank which is collecting. It would be quite unnecessary, according to Mr. Schiller's argument, for any such certificate to be given, because there arises in any event, according to him, from the mere act of presentation of the receipt, an implied warranty by the bank that the person signing the receipt is alive, and that the signature is his signature—that is to say, that, according to his argument, there could be co-existing at one and the same time an express certificate dealing with those matters, signed on behalf of the bank by its officer, and an implied warranty by the bank dealing with the same matters.

It appears to me, bearing all these considerations in mind—the nature of this document and the circumstances in which it is brought into existence, and its language—that it is quite impossible for us to hold that there is an implication of any such contract as is referred to in the various authorities dealing with this branch of the law. The very nature of the document, to my mind, quite clearly negatives any such implication. The result, therefore, is that this argument is one which cannot be accepted. I have stated in my own words what are my reasons for coming to that conclusion out of deference to the argument which has been ,presented to us, but otherwise I should have been satisfied to say that on this branch of the case, I am in entire agreement with the judgment of the judge. In the ordinary course I should not have wished to add anything.

The other branch of the case contains an argument which is designed to obtain the same result by a different means. It is said, and it is said with truth, that, when the Crown Agents paid this money through Lloyds Bank to the defendant bank, they paid it under a mistake of fact. That mistake of fact was in thinking that Mr. Gibson, the pensioner, was alive. That is the fundamental mistake of fact. Had the money remained in the hands of the defendants, I apprehend that there could have been no answer to the claim. But it is not in their hands.

They have paid it away, in the circumstances which I have mentioned. The question then arises as to whether, in view of that fact, the plaintiffs are entitled to recover.

It cannot be contested, and, indeed, it is not contested, that, where an agent has received money paid to him by a third person under a mistake A of fact, if he still has the money in his hands it can be recovered. If, on the other hand, he has paid it away to his principal, then it cannot be recovered from the agent, and the only remedy is to go against the principal. It is said here that the agents, the bank, are not entitled to rely on the second branch of that proposition, because they have not B in fact paid the money to their principal. It is said that the principal for whom they purported to act was Mr. Gibson, and they have not paid the money to Mr. Gibson, but to some fraudulent person who was masquerading as Mr. Gibson.

With all respect to that argument, it appears to me to be based upon C a fallacy. The bank was instructed by a person, whose identity has not been ascertained, who purported to be Mr. Gibson, and the bank, acting for that person, and as the agent of that person, received the money. They supposed that their principal was Mr. Gibson. In point of fact, he was not. But that does not, in my opinion, alter the fact that that D person who actually sent the instructions was their principal. The fact that they thought he was somebody else does not alter the fact that it was that person for whom they were acting. It is to that person that they have paid away the money. In those circumstances, it appears to me that the fact that they were mistaken in thinking that their E principal was Mr. Gibson is quite irrelevant.

The principle on which an agent can resist repayment may be stated in the words used in the House of Lords in *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (2). I will read the statement from the opinion of LORD ATKINSON, at p. 265:

> F Whether he would be liable if he dealt as agent with such a person will depend upon this, whether, before the mistake was discovered, he had paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund.

Without exploring the exact implications of that last case, where "it G would be inequitable to require him to refund," and dealing only with the question of repayment to the principal, it appears to me that, upon the facts of this case, that is exactly what has been done, and that the principal was in fact the person who gave the instructions and sent the receipt asking for the money to be collected, and gave instructions as to H how the money was to be dealt with. That person was the principal, and the fact that the bank was mistaken as to the identity of its principal appears to me not to affect the question at all.

In the result, on this branch of the case also I find myself in agreement with the decision of the judge. That appeal must be dismissed with costs.

Scott, L.J.: I agree with the whole of what Sir Wilfrid Greene, M.R., has said, and have nothing to add.

MacKinnon, L.J.: I agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Burchells* (for the appellants); *Linklaters & Paines* (for the respondents).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

E. TIMM & SON, LTD. *v.* NORTHUMBRIAN SHIPPING CO., LTD.

[Court of Appeal (Greer, Slesser and Clauson, L.JJ.), **March 1, 2, 1938.**]

Shipping—Seaworthiness—Voyage in stages—Sufficiency of coal—Water Carriage of Goods Act, 1910 (*R.S.C.*, 1927, *c.* 207), *ss.* 6, 7.

Under the Water Carriage of Goods Act, 1910 (Canada), s. 6, if the owner of any ship transporting merchandise from any port in Canada exercises due diligence to make the ship in all respects seaworthy, neither the ship nor the owner shall be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect. Under sect. 7 neither the ship nor the owner is liable for loss arising from dangers of the sea or other navigable waters.

A shipowner had contracted to carry a cargo from Vancouver to Hull, and had arranged that his ship should call on the way at St. Thomas for the purpose of bunkering. The quantity of coal normally required by the ship for the voyage to St. Thomas was 650 tons, and the ship left Vancouver with 675 tons on board. A few days after passing through the Panama Canal the captain realised that he had not sufficient coal to reach St. Thomas and accordingly altered course for Jamaica. While proceeding there he struck a reef, and his vessel and cargo became a total loss. The cargo owners claimed damages, and the shipowner contended that (*a*) the ship on leaving Vancouver had sufficient coal and a proper margin to take her to St. Thomas; (*b*) there was a potential coaling port at Colon, and this fact must be regarded in fixing the margin:—

Held: (i) on the facts the ship when she left Vancouver for St. Thomas was not carrying a proper margin of coal.

(ii) if Colon was to be regarded as a coaling port, then the stage to be considered was Colon to St. Thomas, and it was clear on the facts that the ship when it passed Colon had not sufficient coal to take her to St. Thomas.

Judgment of MacKinnon, L.J. (*sitting as an additional judge of the King's Bench Division*) ([1937] 2 All E.R. 847) *affirmed.*

[**EDITORIAL NOTE.** When a voyage is divided into stages, the vessel must then be seaworthy at the commencement of each stage. Thus a vessel which has liberty to call at a particular intermediate port to coal, if she is to be seaworthy after passing that port and not calling there, must have had sufficient coal on passing that port to carry her to the next port of call. The present case considers in detail the seaworthiness of a ship from the point of view of carrying sufficient bunkers.

As to Voyage in Stages, see HALSBURY, 1st Edn., Vol. 26, pp. 214-216, para. 306; and for Cases, see DIGEST, Vol. 41, p. 475, Nos. 3064-3074.]

Cases referred to:

(1) *The Vortigern*, [1899] P. 140; 29 Digest 192, *1517*; 68 L.J.P. 49; 80 L.T. 382.

(2) *Thin* v. *Richards & Co.*, [1892] 2 Q.B. 141; 41 Digest 475, *3072*; 62 L.J.Q.B. 39; 66 L.T. 584.

Appeal from a judgment of MacKinnon, L.J., dated Apr. 29, 1937, and reported in [1937] 2 All E.R. 847. The facts and arguments are fully set out in the judgment of MacKinnon, L.J.

F. A. Sellers, K.C., and *Cyril T. G. R. Miller* for the appellants, the Northumbrian Shipping Co., Ltd.

A. T. Miller, K.C., *Sir Robert Aske, K.C.*, and *A. J. Hodgson* for the respondents, E. Timm & Son, Ltd.

Greer, L.J.: This case turns on one question of fact and one question of law. It is provided by the Canadian Water Carriage of Goods Act, 1910, s. 6, which was applicable to the voyage with which this appeal is concerned:

> If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

In order to succeed on that clause, the appellants have to make out that, when the vessel left Vancouver, she was properly equipped, with regard to the coal on board, for the voyage which she had undertaken. Originally, that was to be considered as the whole voyage from Vancouver to the port of destination, but, by reason of the change that took place from sail to steam, a rule was established that one might regard the voyage as a voyage to be taken in stages, and that, if the owner satisfied the onus upon him of showing that he had taken sufficient precautions to see that the vessel was adequately equipped for each stage, that would be a sufficient protection to him; but the case of *The Vortigern* (1) and other cases make it quite clear that what the owner has to do is to make his vessel properly equipped for the stage which he has set for her on her voyage.

The question of fact to be determined in this case is, first of all, was the vessel properly equipped with regard to the coal for the first stage of her voyage, which was from Vancouver to St. Thomas? In fact, it is quite clear that she was not properly equipped, because she could not get to St. Thomas, as she had not enough coal on board to take her there, and she therefore failed to be properly equipped for the voyage to St. Thomas. It is argued upon the basis of certain evidence given before the judge in the court below that she was properly equipped because she had a margin which she was entitled to consider sufficient, having regard to the fact that, if she was proved to be short of the necessary amount of coal, she could have obtained some additional coal at Colon, which was not one of the stages contemplated by the contract. If it had been established that the weather which she met, and could not expect, was abnormal weather, then it might well be that the judge would have been entitled, and perhaps bound, to come to the conclusion that she was properly equipped. He had to deal, however, with the question of seamanship—that is to say, with the question as to what a prudent owner would expect he would have to encounter on the A voyage from Vancouver, and, dealing with that question, he says, at p. 851 :

> It is therefore the fact, and the indisputable fact, that you did start from Vancouver with an insufficiency of coals for this stage to St. Thomas ; and, if you did that, then you can escape the conclusion that you did not make the ship seaworthy in respect of bunkers only if you can make out that there was anything B abnormal or unexpected, or anything in the way of a cataclysm or disaster, on this voyage.

I understand the judge by that to mean that every prudent owner should make provision for weather conditions which might be a little more troublesome than he would normally expect them to be. Then he says, C at p. 851 :

> There was nothing of the sort. There was the usual winter weather in the Pacific part of the passage ; there was the usual blowing of the trade winds and currents in the Caribbean Sea. There was nothing really abnormal in the voyage, and yet that which you took [that is, which you, the shipowner, took] was insufficient.

D

Then further down he deals in a little more detail with the events of the voyage. At p. 852, he says :

> I have considered this matter, and I do not want to go into it in great detail. I do not think it has been made out that she had more than 675 tons at Vancouver. Was that enough ? That question has been debated from various points of view and various aspects. Here again I do not want to go into all those details. My E conclusion is that, if it be a question of supplying this vessel at Vancouver with a sufficiency of coal to take her to St. Thomas, and with a reasonable margin, in addition to the likely minimum amount required for that—a reasonable margin for the contingencies to which any voyage must be subject—I think that she did not have enough coal in starting with 675 tons.

That was the conclusion to which the judge came, after giving due F weight to the evidence which was called before him. As far as the evidence of the experts was concerned, it is quite clear that the experts thought, in considering whether there was a sufficiency of coal to get the vessel to St. Thomas, that the master, on behalf of his owners, was entitled to take into consideration the fact that she might, if she found G herself short, have obtained some more coal at Colon. It is a question of law to be determined by this court, as to whether or not, on the authorities as they stand, it would be possible to take the view that the voyage is to be regarded as a voyage in two stages to St. Thomas, one to Colon and the other from Colon on to St. Thomas. H

In *The Vortigern* (1), the court appears to me to have decided that that question put the owners in a dilemma, because, if they regarded the voyage for which they were preparing as a voyage to St. Thomas, having regard to the kind of weather which a prudent owner would expect, the obvious result would be that, upon the facts, they had not enough coal on board; they had not a sufficient margin. On the other hand, however, if they were entitled to take into consideration the fact that they could get coal at Colon, then it was quite clear that they ought to have taken in coal at Colon sufficient for the rest of the voyage, and they did not do so. On the law as it stands, I think that there is no A possibility of deciding the question otherwise than as it was decided in *The Vortigern* (1), which case is exactly in point.

I was, to some extent, impressed by the able and forcible argument which has been put, under very considerable difficulties, by Mr. Sellers, on behalf of the appellants, as indicating the view that, taking the facts B as the judge found them, there was a sufficient margin when the vessel started from Vancouver. Yet, though, in a sense, we are entitled to try the whole question of fact and law over again, this being a re-hearing, one must attach the greatest possible weight to the judge's view of the evidence which was called before him, including his refusal to accept the C calculation which was made by the officers of the ship as to what coal the vessel had on board in the shape of something which is said to be "up their sleeve." The judge did not accept those witnesses as giving a reliable account of the method of calculation which they adopted. I find it myself quite impossible to differ from the judge's conclusion in D that respect. I think that he was entitled, and rightly entitled, to come to the conclusion that, when the vessel left Vancouver, there was not left a sufficient margin of the coal which had been put on board at Jamaica, which was supposed to be sufficient to leave enough when she got to Vancouver to take her on the first stage of her voyage.

E For these reasons, I think that we are unable to disturb either the judge's finding of fact or the judge's application of the law as laid down in *The Vortigern* (1), and I therefore think that this appeal must be dismissed with costs.

F SLESSER, L.J.: I agree that this appeal fails, for the reasons stated by GREER, L.J., which I think are also in substance the reasons stated by the judge who heard this case. I propose, therefore, to deal with only one argument, as I understand it, of Mr. Sellers, founded on the Canadian Water Carriage of Goods Act, 1910, which is incorporated, G so far as its terms are concerned, in this bill of lading. As I understand it, his case under that Act is this. Assuming that there was opportunity to obtain coal at Colòn, and admitting that no coal was there obtained, he says that that failure was an act of negligence on the part of the captain, which therefore falls, not within sect. 6, but within sect. 7 of H the statute, and, in consequence, is negligence for which the owners, under the terms of the statute as incorporated in the bill of lading, are not responsible.

In my view, that argument is fallacious. When the reasoning in the cases, particularly in *The Vortigern* (1), to which GREER, L.J., has referred, and in the earlier case of *Thin* v. *Richards & Co.* (2), and, more particularly, when the observations of Fry, L.J., at p. 144, are considered, they show, as I think is made clear by Fry, L.J., at p. 144, that the law imposes a warranty of seaworthiness for the entire voyage contemplated by the parties, and that the shipowner ought not to be able to escape from this liability by dividing the voyage into stages. In other words, it is incumbent upon the owner to show, in the language of sect. 6, that he has exercised "due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied," and, if he fails so to show, on the basis that he might conceivably have so equipped the ship at Colon, if that were treated as a second stage, and did not, his failure is a failure to comply with his obligation to exercise due diligence, albeit that that failure was in fact due to the negligence of the captain. That is to say, the fact that the captain was negligent does not excuse the owner from the obligation to exercise due diligence in having the ship properly equipped on that second stage, assuming that a second stage did start at Colon.

Clauson, L.J.: I agree. The argument on behalf of the appellants fails to induce in my mind any doubts whatever as to the correctness of the judge's decision on the facts, and, as regards the law applicable to the case, I should be content myself to adopt the statement with regard to the law in the judge's judgment.

Appeal dismissed with costs. Leave to appeal granted.

Solicitors: *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the appellants); *Clyde & Co.* (for the respondents).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

HUGHES (INSPECTOR OF TAXES) *v.* BANK OF NEW ZEALAND.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, and Lord Maugham), **January 28, 31, February 1, March 4, 1938.**]

Income Tax—Non-resident trader—Interest on government securities—Interest on securities of foreign and colonial companies—Expenses of earning profits exempt from tax—Income Tax Act, 1918 (*c.* 40), *s.* 46, *Sched. C, r.* 2 (*d*), *Sched. D, Misc. Rules, r.* 7 (2).

The Bank of New Zealand had a branch in London, and was assessed in respect of profits arising from the trade carried on there. There had been purchased out of the floating capital of the London branch 5 per cent. War Loan, 3 per cent. India government stock, and securities of two colonial companies. The interest on the War Loan was paid without deduction of tax, and the interest on the other securities had been paid less tax, but the amount of the tax had been repaid on the ground that there was no residence in the United Kingdom:—

Held: (i) the interest on the War Loan was not subject to tax, because absolute exemption is given by the Income Tax Act, 1918, s. 46.

(ii) the interest on the India government stock was exempt from tax, because the Income Tax Act, 1918, Sched. C, r. 2 (*d*), affords absolute exemption.

(iii) the dividends of the colonial companies were exempt from tax, because Sched. D, Misc. Rules, r. 7 (2), although ambiguous in form, must be held to make the absolute exemption under Sched. C, r. 2 (*d*), also applicable to dividends of colonial companies.

A (iv) as the expenses incurred by the bank in connection with the aforementioned investments, which were part of the business of its trade, were wholly or exclusively incurred for the purposes of the said trade, such expenses constituted a proper deduction in computing the profits thereof.

Order of Court of Appeal ([1936] 3 All E.R. 975) *affirmed.*

B **[EDITORIAL NOTE.** The House of Lords have affirmed the decision of the Court of Appeal in this case as to the absolute exemption of certain War stocks from tax, and that the expenses of earning this non-taxable interest are a proper deduction against profits.

FOR THE LAW ON THE POINTS RAISED, see HALSBURY, Hailsham Edn., Vol. 17, p. 11, para. 10, and p. 380, para. 779; and FOR CASES, see DIGEST, Vol. 28,
C pp. 32-37, Nos. 166-198.]

APPEAL from an order of the Court of Appeal (LORD WRIGHT, M.R., ROMER and GREENE, L.JJ.), dated Dec. 10, 1936, and reported in [1936] 3 All E.R. 975, dismissing an appeal by the appellant from an order of
D LAWRENCE, J., dated May 1, 1936, and reported in [1936] 2 All E.R. 125, whereby an appeal by the appellant upon a case stated by the commissioners for the special purposes of the Income Tax Acts was dismissed and the decision of the commissioners was affirmed. The facts and the arguments are set out in the opinion of LORD THANKERTON.

E *The Attorney-General* (*Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the appellant.

A. M. Latter, K.C., and *J. S. Scrimgeour* for the respondents.

F **LORD ATKIN**: My Lords, in this case I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD THANKERTON. I agree with it, and find it unnecessary to add anything.

G **LORD THANKERTON**: My Lords, the respondent bank, which admittedly resides in New Zealand, and is not resident or ordinarily resident in the United Kingdom, has a branch office in London. It is admittedly assessable to income tax under the Income Tax Act, 1918, Case I, Sched. D, on the profits arising from the trade exercised at the
H London branch, and the present appeal relates to an assessment to income tax in the sum of £94,448 for the year ending Apr. 5, 1929, made upon it by the additional commissioners of income tax for the city of London under Case I, in respect of these profits.

The following statement shows, in summary form, the material receipts and expenses of the London branch for the year ending Mar. 31, 1928, upon which the assessment was based, as adjusted for income tax purposes by the additional commissioners :—

Dr.	£		*Cr.* £
Working expenses	41,070	Exchange and commission (mainly profit on exporters' bills purchased)	90,600
Interest paid on deposits and balances in London	19,312	Loans to banks and discount houses	37,209
Rebates on bills receivable which were immature on Mar. 31, 1928	7,814	Interest on overdrawn accounts	25,558
Commission and exchange	36,482	Interest on dishonoured bills	2,122
Interest and expenses paid in New Zealand in respect of money borrowed in New Zealand, and used at the London branch	112,868	Discounts on Treasury bills	68,037
(*Note.*—This item includes £41,262 in respect of money borrowed in New Zealand and used in the purchase of the following assets of the London branch :— War Loan 5 per cent. India 3 per cent. Grand Trunk Pacific Railway. Auckland Electric Power Board.)		Interest on War Loan 3½ per cent.	6,043
		Interest on War Loan 5 per cent.	75,621
		Interest on India 3 per cent.	1,500
		Interest on Grand Trunk Pacific Railway	412
		Interest on Auckland Electric Power Board	1,023
		Profit on sale of securities	10,714
		Exchange adjustment	14,730
Balance profit	116,023		
	£333,569		£333,569

The respondent bank appealed against the assessment, and maintained that, under certain statutory exemptions, the following four credit items should be excluded from the account :

		£
1.	Interest on War Loan 5 per cent.	75,621
2.	Interest on India 3 per cent.	1,500
3.	Interest on Grand Trunk Pacific Railway	412
4.	Interest on Auckland Electric Power Board	1,023
		£78,556

The Crown disputed the respondents' contentions, but maintained that, if these items, or any of them, fell to be excluded, the proportion of the debit item of £112,868 for interest and expenses which was attributable to the cost of obtaining the money used in earning the item or items so excluded should also be excluded, so that only the net profit derived should be excluded from the trading account. As stated above, the proportion attributable to the four credit items sought to be excluded is £41,262, which consists of the cost of obtaining from New Zealand the money used in these four securities, so far as it is not part of the bank's capital, and takes into account, not only the average rate of interest paid on deposits in New Zealand, and the cost of issuing notes there, but also an appropriate proportion of the general expenses incurred by the bank there.

The special commissioners upheld the respondents' contentions and excluded the four credit items from the account, and rejected the appellant's contention, on that footing, for exclusion of the debit item of £112,868 to the extent of £41,262. In accordance with this decision, the assessable profit was reduced from £116,023 by the amount of the four credit items (£78,556), to £37,467. On appeal to the King's Bench Division, LAWRENCE, J., affirmed the determination of the special commissioners, and his judgment was affirmed, on appeal, by the Court of Appeal, against whose judgment the present appeal is taken.

The statutory provisions on which the respondents base their claim for the exclusion of the items are as follows:

1. As regards the War Loan interest, the Income Tax Act, 1918, s. 46, which provides:

> (1) Where the Treasury have before the commencement of this Act issued or may thereafter issue any securities which they have power to issue for the purpose of raising any money or any loan, with a condition that the interest thereon shall not be liable to tax or super-tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest of securities issued with such a condition shall be exempt accordingly.

2. As regards the India Government Stock, Sched. C, General Rules, r. 2, which provides:

> No tax shall be chargeable in respect of . . . (*d*) the interest or dividends on any securities of a foreign state or a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the commissioners of inland revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom; but, save as provided by this Act, no allowance shall be given or repayment be made in respect of the tax on the interest or dividends on the securities of any foreign state or any British possession which are payable in the United Kingdom: . . .

3. As regards the Grand Trunk Pacific and Auckland Electric Power stocks, the respondents contend that Sched. C, r. 2 (*d*), was made applicable to the interest on these stocks by Sched. D, Misc. Rules, r. 7 (2), which provides as follows:

> (1) Where (*a*) any interest . . . . payable out of or in respect of the stocks, funds, shares, or securities of any foreign or colonial company . . . . are intrusted to any person in the United Kingdom for payment to any persons in the United Kingdom, the same shall be assessed and charged to tax under this schedule by the special commissioners.
>
> (2) All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person . . . . for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under this rule.

As regards the War Loan, the Crown did not maintain their appeal. In this I think that the Crown were well-advised, for I agree with LORD WRIGHT, M.R., that their contention is contrary to the apparent meaning of the statutory provisions, originally contained in the Finance (No. 2) Act, 1915, s. 47, and would involve the very serious frustration of what the parties, taking the securities from time to time, might be assumed to have contemplated. It is necessary, however, to notice here an argument which the Crown put forward as applicable to all the four credit items in dispute—namely, that the provisions of sect. 46 (1) of the Income Tax Act, and Sched. C, General Rules, r. 2 (*d*), merely exempted certain interest paid to persons not resident, or not ordinarily resident, in the United Kingdom from charge under Sched. C or Sched. D, Case III, *qua* interest, and did not operate to exclude any trading receipts of a trade exercised in the United Kingdom from the computation of the profits of the trade for the purposes of assessment under Sched. D, Case I. This appears to have been the only argument submitted by the Crown as to the War Loan, but, despite their abandonment of it as regards the War Loan, they still maintained it as regards the remaining items before your Lordships.

My Lords, I have no difficulty in rejecting this contention. I agree with the courts below that, whether as interest or as a component part of the profits of a trade, the exemptions must equally apply.

The only question remaining as to the India Government Stock is whether Sched. C, General Rules, r. 2 (*d*), refers only to tax under Sched. C or is of general application. In my opinion, it is clearly not limited to Sched. C in its operation. The opening words of the rule do not limit it to no tax " under this schedule," as is done in both r. 1 and r. 3, and it can hardly have been the intention to limit the exemption of the stock, dividends or interest of an accredited minister of any foreign state under r. 2 (*c*). Equally, there seems to be no reason in so limiting r. 2 (*d*). But, further, r. 2 (*d*) is a consolidation of the exemption conferred by the Finance Act, 1910, s. 71 (2), which was not limited to any particular schedule.

A more difficult question arises as to the Grand Trunk Pacific and Auckland Electric Power stocks—namely, as to the extent of the incorporation of the provisions of Sched. C by Sched. D, Misc. Rules, r. 7 (2), in view of the words:

> relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person (other than the National Debt Commissioners or the Bank of England or the Bank of Ireland) for payment to any persons in the United Kingdom.

The Crown maintain that the small group of nine rules under Sched. C, entitled " Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland, and the National Debt Commissioners are intrusted," is alone incorporated by r. 7 (2). That group of rules relates to the payment of dividends payable out of the public revenue of Northern Ireland, or which are payable to any persons in the United Kingdom out of any public revenue other than that of the United Kingdom or of Northern Ireland. It is to be noticed that by r. 9 of these rules the expression " dividends " is defined as including interest, annuities, dividends, and shares of annuities, and that in the eight preceding rules the word " dividends " is alone used. That group of rules is properly described as providing mere machinery.

The respondents maintain that the language of r. 7 (2) is apt to include every provision of Sched. C which, *mutatis mutandis*, is applicable to the dividends described in r. 7 (2), and that among such provisions Sched. C, General Rules, r. 2 (*d*), necessarily has a place.

My Lords, I feel the greatest difficulty in coming to any clear con-
A clusion on the matter. I find the language of the subsection of r. 7 evasive and ambiguous. A slight alteration of the words could have clearly expressed either of the opposing constructions.

In the first place, I agree with the Court of Appeal in their acceptance of the argument of the Crown that the Finance Act, 1910, s. 71 (2), did
B not confer the exemption here claimed, and in their rejection of Mr. Latter's contention to the contrary. It follows that this exemption, if the respondents are right in their construction, is conferred for the first time by the Consolidation Act. The presumption against such a construction was rightly recognised by the Court of Appeal, but they held
C that the language of the subsection is sufficiently clear to overcome the presumption. They felt fortified in this view by the provisions of the Finance Act, 1924, s. 27, to which I will refer later.

The Crown's main contention is that r. 7 is not a charging rule, but merely provides machinery for collection of tax, and that it would be
D out of place to find an exemption from tax in the rule. They claim, with some force, that the terminology of r. 7 (2) substantially reproduces the heading of the small group of rules of Sched. C above referred to, noting incidentally that dividends are alone referred to, and that it is only in the small group that dividends are alone referred to, coupled with
E a definition clause.

The Court of Appeal held that r. 7 (1) was a charging provision, and that the opening words of r. 7 (2)—" All the provisions of Sched. C relating to the tax to be assessed and charged "—were general, and clearly included the general rules, *mutatis mutandis*. On the first point,
F I find it sufficient to say that, in my opinion, rules which are described as miscellaneous, and which contain, for instance, in r. 2, an undoubted exemption, afford a not inappropriate place for the grant of exemptions. It is on the wording of r. 7 (2), however, that I feel doubt, for the words, following the opening words quoted above, have some resemblance to
G the heading of the small group of rules of Sched. C, taken along with the subject-matter of the group, as defined in r. 1 of the group. The ambiguous nature of these words, so far as bearing on the point at issue, does not enable me to differ from the firm opinion of all three members of the Court of Appeal.

H As already stated, however, the Court of Appeal, and in particular, LORD WRIGHT, M.R., and GREENE, L.J., found confirmation for their view of r. 7 in the provisions of sect. 27 of the Act of 1924, which provides a right of appeal from " the decision of the inland revenue commissioners " in certain specified cases. Sect. 41 of that Act provides that Part II, which includes sect. 27, is to be construed together with the Income Tax Acts. Among the cases specified, the material provision [of the Finance Act, 1924, s. 27] is as follows:

> (3) This section applies to the following questions:—
> (c) any question as to residence arising—
> (i) under para. (*d*) of r. 2 of the General Rules applicable to Sched. C; or
> (ii) under r. 7 of the Miscellaneous Rules applicable to Sched. D in connection with a claim for repayment of income tax made to the commissioners of inland revenue by the person owning the stocks, funds, shares or securities and entitled to the income arising therefrom, or entitled to the annuities, pensions or other annual sums, as the case may be, and from whose income a deduction has been made on account of the income tax assessed and charged under the said rule. A

LORD WRIGHT, M.R., holds that head (ii) of subsect. (3) (*c*) treats r. 7 as containing a provision in the terms set out, and holds that the terms set out are the exact terms to be found in Sched. C, General Rules, r. 2 (*d*), and that, accordingly, they can only be found in Sched. D, Misc. Rules, r. 7, if r. 7 (2) has incorporated them, which is the conclusion at which he had already arrived. GREENE, L.J., expresses the same view, and also lays stress on the use of the word "decision," on the ground that that could only refer to a power of decision expressly conferred on the commissioners of inland revenue. I find myself unable to agree with this latter view. In my opinion, it may well refer to a refusal to concede the claim of the aggrieved person, which, prior to the Act, would have involved a petition of right—a procedure which the provision was apparently designed to obviate. On the first point expressed by the judges I do not feel so clear as to utilise this *ex post facto* legislation in the construction of the Act of 1918, but, again, I am not prepared to reverse, on appeal, the clear decision of the Court of Appeal. If the policy of the Crown is otherwise, it is for them to rectify the ambiguities by amending legislation. I am therefore of opinion that the appeal of the Crown fails on all the main questions. B C D E

There remains the alternative question as to reduction of the amount of the four credit items so to be excluded from the computation by a proportionate part of the debit item of £112,868, which has been agreed at £41,262. It is perhaps enough to say that the Crown are unable to point to any statutory provision in support of their contention, whereas the respondents find full justification for their resistance in the provisions of Sched. D, Cases I and II, r. 3, which is as follows: F G

> 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation.

In order to ascertain the authorised deductions, it is right to turn this into positive form. In this view, it seems to me to be incontrovertible that, in the present case, the investments in question were part of the business of the respondents' trade, and that the expense connected with them was wholly or exclusively laid out for the purposes of the trade. Expenditure in course of the trade which is unremunerative is none the less a proper deduction, if wholly and exclusively made for the purposes H of the trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense. I agree on this question with the decision of the courts below.

I am of opinion, accordingly, that the decision of the Court of Appeal should be affirmed, and that the appeal should be dismissed with costs.

A

LORD RUSSELL OF KILLOWEN: My Lords, I agree.

LORD MACMILLAN: My Lords, I also agree.

LORD MAUGHAM: My Lords, I concur.

B *Appeal dismissed with costs.*

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Linklaters & Paines* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

PATON (FENTON'S TRUSTEE) *v.* INLAND REVENUE COMMISSIONERS.

[House of Lords (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Maugham), **January 24, 25, 27, March 4, 1938.]**

Income Tax—Bank interest—Loan account—Interest added to loan each half-year—Whether interest paid—Income Tax Act, 1918 (*c.* 40), *s.* 36.

F. borrowed a large sum from a bank, in respect of which the bank opened a separate loan account. Each half-year, interest at an agreed rate, and without deduction of tax, was placed to the debit of the account, and the aggregate amount was then treated as principal for the following half-year :—

Held : as, in the circumstances, there was no ground for holding that the interest in question was in fact paid by F., the question as to whether it was paid " out of profits or gains brought into charge " did not arise.

Order of Court of Appeal ([1936] 1 All E.R. 116) *affirmed.*

[EDITORIAL NOTE. In the Court of Appeal the main topic of the judgments was whether the interest here in question had been paid out of profits or gains brought into charge. This point is not dealt with in the opinions given in the House of Lords, which deal only with the question whether or not the facts proved amount in law to payment of the interest by the tax-payer. This point had been decided by the Court of Appeal in *I.R. Comrs.* v. *Holder* (1), but, upon that case going to the House of Lords, it was decided upon a different point. The decision of the Court of Appeal in *I.R. Comrs.* v. *Holder* (1) therefore came under review on the present appeal. The Lords Justices in the Court of Appeal had been largely influenced by the Scottish decision, *Reddie* v. *Williamson* (5), but their view of that case has not met with approval in the House of Lords, and it is now clear that the Income Tax Act, 1918, s. 36 (1) requires a real payment of tax and a constructive payment is insufficient. It was considered irrelevant in the present case that this might perhaps involve double taxation of the same income.

As to Income Tax Act, 1918, s. 36 (1), see HALSBURY, Hailsham Edn., Vol. 17, p. 334, para. 671 ; and for Cases, see DIGEST, Vol. 28, pp. 97, 98, Nos. 580-585.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Holder*, [1931] 2 K.B. 81 ; Digest Supp. ; 100 L.J.K.B. 439 ; 145 L.T. 193 ; *on appeal,* [1932] A.C. 624 ; 101 L.J.K.B. 306 ; 147 L.T. 68 ; 16 Tax Cas. 540.

(2) *Ex parte Bevan* (1803), 9 Ves. 223 ; 35 Digest 200, *270.*

(3) *Eaton* v. *Bell* (1821), 5 B. & Ald. 34 ; 3 Digest 245, *706.*

(4) *Clancarty* (*Lord*) v. *Latouche* (1810), 1 Ball & B. 420 ; 3 Digest 265, case *817i.*

(5) *Reddie* v. *Williamson* (1863), 1 Macph. (Ct. of Sess.) 228 ; 7 Digest 194, case *n.*

(6) *Re Jauncey, Bird* v. *Arnold,* [1926] Ch. 471 ; 32 Digest 317, *35* ; 95 L.J.Ch. 377 ; 134 L.T. 728.

(7) *A.-G.* v. *Metropolitan Water Board,* [1928] 1 K.B. 833 ; Digest Supp. ; 97 L.J.K.B. 214 ; 138 L.T. 346 ; 13 Tax Cas. 294.

(8) *Bank of England* v. *Vagliano Brothers,* [1891] A.C. 107 ; 3 Digest 244, *703* ; 60 L.J.Q.B. 145 ; 64 L.T. 353 ; *affg.* (1889), 23 Q.B.D. 243.

Appeal from an order of the Court of Appeal (Lord Wright, M.R., and Romer, L.J., Greene, L.J., dissenting) dated Jan. 24, 1936, and reported in [1936] 1 All E.R. 116, dismissing an appeal by the appellant from an order of Finlay, J., dated Mar. 25, 1935, whereby an appeal by the appellant upon a case stated by the commissioners for the special purposes of the Income Tax Acts was dismissed and the determination of the said commissioners affirmed. The facts and the arguments are set out in the opinions.

A. M. Latter, K.C., and *F. Heyworth Talbot* for the appellant.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

LORD ATKIN: My Lords, the question in this case arises on the claim of the appellant trustee under a deed of arrangement executed in 1921 by Henry Fenton, to have repaid to him under the provisions of the Income Tax Act, 1918, s. 36, money which he says Fenton in the financial years ending Apr. 5, 1921, and Apr. 5, 1922, paid without deduction of tax out of profits and gains brought into charge as interest payable on an advance from Martins Bank. The commissioners say that Fenton did not pay the interest in the years in question, or at all, and that, if he did, he did not pay out of profits and gains brought into charge. FINLAY, J., and all the members of the Court of Appeal held themselves bound, as they were, by a previous decision of the Court of Appeal in *Inland Revenue Comrs.* v. *Holder* (1), to decide that the interest had been paid. They differed as to whether it had been paid out of profits and gains brought into charge, LORD WRIGHT, M.R., and ROMER, L.J., holding that it had not, GREENE, L.J., holding that it had. Counsel for the appellant have been heard on both points, but your Lordships did not find it necessary to decide the second point, and have not heard the Attorney-General upon it, and I express no opinion with regard to it. I am myself satisfied that the facts found by the special commissioners do not disclose any payment of the interest in respect of which the claim is made. The transaction with the bank is a simple one. In Oct., 1918, the bank advanced to Mr. Fenton the sum of £250,000 to complete the purchase of the share capital of a company in Labrador owning a large forest property. They took as security the shares in the company. The account is kept as an ordinary bank account, and is not styled a loan account. Throughout, there are no credit items, but the account is debited with cables to Canada, no doubt in connection with the transaction, and with small commissions to the Canadian bank, through which the transaction had been completed. At the end of the first half-year, in Dec., 1918, the bank debit the account with charges, £4,089 5*s.* 3*d.*, which includes interest, and show a debit balance of £254,121 12*s.* 7*d.*, made up of the original advance of £250,000, the amount of the cables and commission referred to, and the above sum for "charges." The account, balanced on Dec. 23, 1918, begins the next half-year period on Dec. 23, with a debit item: "to balance, £254,121 12*s.* 7*d.*" There are no entries for the half-year until June 23, 1919, when charges £7,602 14*s.* 7*d.* are debited. The account is then balanced at £261,724 7*s.* 2*d.*, and that balance is again brought down as the first

debit item in the next half-year's account, which is balanced on Dec. 31, 1919, at £270,349, after debiting charges £8,613 7*s.* 7*d.* together with small sums for cables. We now come to the year 1920, in which the first year of charge in the present case begins. In the first half-year, the balance of £270,349 6*s.* 2*d.* is brought down, and, in addition to a few pounds for cables and payment to the Canadian bank on June 30, A
charges £9,999 16*s.* 3*d.* are debited, and the balance shown is £280,364 11*s.* 2*d.* I may set out the next two half-years' accounts :

		£	s.	d.		
1920						
June 30	To balance	280,364	11	2		
Dec. 31	Charges	11,306	15	5	Dec. 31, 1920	
					By balance £291,671 6 7	B
		291,671	6	7		
Dec. 31	To balance	291,671	6	7		
1921						
June 4	Stp. & Fees on Equit. charge	10	10	0	June 30, 1921	C
June 24	Charges	11,291	6	1	By balance £302,973 2 8	
		302,973	2	8		
June 30	To balance	302,973	2	8		

The question is whether, when the charges are added to the existing indebtedness at the end of one half-year, and the whole sum brought down D
is a debit item at the beginning of the next half-year, so that interest is charged on the last half-year's interest, the charges have been paid. The ordinary man would, I think, say that, so far from being paid, they are added to the ordinary indebtedness, because they are not paid, and I can see no reason why the law should say anything different. It E
is obvious that the system adopted by banks, which seems to have been common practice in the time of Lord Eldon, L.C., is for the purpose of giving them compound interest without perhaps flaunting that fact before their customers.

It would seem that the members of the Court of Appeal in *Holder's* F
case (1) considered that there was a line of authority which led them to the conclusion that, in these circumstances, the interest must in law be deemed to have been paid. I do not think that this is the result of the cases. *Ex parte Bevan* (2) was a case of a petition in bankruptcy to be allowed to prove. One objection made was "that in settling accounts G
half-yearly interest had been turned into principal." At that time the Usury Act, 1713 (12 Ann. Stat. 2, c. 16), was in force, which made illegal a contract to pay interest at a rate higher than 5 per cent. per annum. It does not appear from the report what was the nature of the debt or what were the occupations of either petitioner or debtor. Lord Eldon, H
L.C., said, at p. 224 :

> As to the question of compound interest, it is clear, you cannot *a priori* agree to let a man have money for twelve months, settling the balance at the end of six months; and that the interest shall carry interest for the subsequent six months: that is, you cannot contract for more than 5 per cent.: agreeing to forbear for six months. But, if you agree to settle accounts at the end of six months, that

> not being part of the prior contract, and then stipulate, that you will forbear for six months upon those terms, that is legal.

There is here not a suggestion of payment. The only question for LORD ELDON, L.C., was the supposed illegality. An antecedent (*a priori*) agreement for half-yearly rests and interest upon the balance would be void, but, if one settles, i.e., agrees, the balance at the end of six months, there is nothing to prevent one from making a fresh start with the total debt, which no doubt includes interest, and agreeing to forbear from suing for the whole debt at a rate of interest meantime. In *Eaton* v. *Bell* (3), the plaintiffs were bankers, and had held the defendant's account for a number of years, making up the accounts with half-yearly rests, in pursuance of the practice above described. Both counsel and ABBOTT, C.J., refer to the question as one of compound interest, and ABBOTT, C.J., says, at p. 40:

> . . . it is now settled, that a party advancing money to another is entitled to charge interest, and at the end of every year, then to add the principal to the interest.

Later, he describes the process as converting the interest from time to time into capital. There is again not a word as to payment, and why it should be considered authority for the contention I do not know. I should have mentioned in order of date *Clancarty* (*Lord*) v. *Latouche* (4). There the plaintiffs had brought an action against the defendants, bankers of one Conolly whose executors the plaintiffs were, for an account of their testator's transactions. The plaintiffs had objected to the system of yearly rests. LORD MANNERS, L.C., directed yearly rests, and said, at p. 428:

> for otherwise the defendants would not have legal interest for their money. If the interest were paid to them regularly at the end of the year that interest in their hands would become capital and be invested; if it were not paid, they would not at the end of the second year receive legal interest upon the whole of the debt, due to them from Mr. Conolly unless that part of the debt, which consisted of interest, due at the end of the first year, was treated as capital; what is there in law or equity against this transaction?

It will be observed that LORD MANNERS, L.C., so far from deeming the interest paid, considered it unpaid, and relied on that fact as justification for treating it as capital. Then comes the case of *Reddie* v. *Williamson* (5), which has the high authority of LORD PRESIDENT INGLIS, then Lord JUSTICE-CLERK. In that case the dispute was between a co-obligant on a cash-credit bond given to a bank by the pursuer and his son, who was the customer of the bank. The bond was for £400 and interest. The account had been kept with yearly rests in accordance with the usual custom, and, at the date of the death of the customer, in 1850, showed, in accordance with the last balance of May 30, 1849, an indebtedness of £834. The question was whether, as the pursuer claimed, the amount due was £400, with interest from May 30, 1849, or whether, as the bank claimed, the amount was £400, with interest from Jan., 1844, the first date at which £400 principal became due on the account. The decision of the Second Division of the Court of Session was that the former view was right, interest on £400 having been extinguished from year to year by being added to principal in accordance with banking practice. The statement of the LORD JUSTICE-CLERK must be set out at some length. After stating that the co-obligants are bound to pay up the interest at the end of the year, though the principal sum be not payable, he proceeds, at p. 237.

> But if the bank instead of demanding from the co-obligants the interest due at the end of the year, choose, in concert with the obligant who is authorised to operate on the account, to avail themselves of their privilege of accumulating that interest with the capital, without any communication with the other obligants, they are dealing with the account, as far as these other obligants are concerned, in precisely the same way as if the leading obligant instead of paying the interest otherwise at the end of the year, had given the bank a cheque for the amount on the cash-credit account with which the bank extinguished the interest, and then placed the amount of the cheque to the debit of the cash account as an ordinary draft. In this last case there can be no doubt, that the credit would be additionally exhausted proportionally to the amount of the cheque given in payment of the interest: and if the full sum of the credit had been previously drawn out, the cheque for the interest would be an unauthorised overdraft, for which the other co-obligants could not be made answerable. But does it make any difference, that without a cheque the same amount is placed to the debit of the account, and thereafter dealt with as a principal sum drawn out? I think not. The privilege of a banker to balance the account at the end of the year and accumulate the interest with the principal is founded on this plain ground of equity, that the interest ought then to be paid, and, because it is not paid, the debtor becomes thenceforth debtor in the amount, as a principal sum itself bearing interest.

As I understand this judgment, the LORD JUSTICE-CLERK so far from saying that the interest is paid or is deemed to be paid, is saying that it is unpaid, and, because unpaid, the customer becomes debtor in the account as a principal sum. The position of the co-obligants, he says, in such a case, is like that which would arise if the interest had been charged by a cheque drawn on the account, when the principal sum would be increased by the amount of the cheque. A misfortune in the case is that LORD COWAN, misinterpreting, as I venture to think, the analogy adopted by the LORD JUSTICE-CLERK goes further, and says, in a passage cited in *Holder's* case (1) by ROMER, L.J., that the true view is that the periodical interest must be held to have been paid when placed to the debit of the account as an additional advance by the bank for the convenience of the obligants. This seems to me contrary to what was said by the LORD JUSTICE-CLERK and to be wrong. The simple fact is that the amount of interest accruing during the half-year is ascertained at the end of the half-year, and is added to the account as a debt in precisely the same position as the other debit items, whether for money lent, the price of securities bought, commission, or other source of debt. It takes its position as part of the whole debt due to the bank, and, as part of the whole debt, is in the next half-year chargeable with interest. It is no more paid than are other items of the total debt. This is the view, I think, clearly expressed by my noble and learned friend LORD RUSSELL OF KILLOWEN, then RUSSELL, J., in *Re Jauncey, Bird* v. *Arnold* (6), where in a mortgage deed there was a provision that, whenever interest was in arrear for 21 days, it should be treated as an accretion to the capital moneys thereby secured, and should thenceforth bear interest. It was contended that, in those circumstances, interest must be deemed to have been paid, so as to affect the meaning of the Real Property Limitation Acts. RUSSELL, J., said, at p. 476, that such a construction :

> would really amount to a travesty of the actual facts ; because in the case of such a provision as is contained in the present deed which enables the interest to be capitalised, the interest is not capitalised because it is in fact paid, but because it has in fact not been paid.

I can add nothing to that succinct statement.

I think, therefore, that, in circumstances such as the present, there is no ground for holding that the interest in question was paid by Mr. Fenton, and therefore the interesting question as to whether, if paid, it was paid out of profits and gains brought into charge does not arise. I would add only that the question does not arise in this case as to whether, if the debit balance, including interest, is paid in the next or succeeding accounts, either in whole, or by a specific appropriation of a sum to the past interest, that is or is not a payment of interest for the purposes of the Income Tax Act. It may well be that interest is not as finally extinguished as some of the above decisions seem to suggest, and I can see the hardships that would arise if, when the half-year's interest is ascertained only on Dec. 31, and the whole balance is debited on Jan. 1, the customer were debarred from income tax relief. That particular point does not arise here. For these reasons, I think that the appeal should be dismissed with costs here and below.

LORD THANKERTON : My Lords, my noble and learned friend LORD ATKIN has so fully expressed my views on the matter that I cannot usefully add anything, except that I would like to add this in particular, that, having had the privilege of reading the opinion about to be delivered by my noble and learned friend LORD MACMILLAN, I desire to express my concurrence in his analysis of the Scottish case of *Reddie* v. *Williamson* (5).

LORD RUSSELL OF KILLOWEN : My Lords, I am unable to see how, upon the facts of the present case, it can be said that there was any payment by Fenton of the interest in respect of which repayment of tax is claimed under the provisions of the Income Tax Act, 1918, s. 36 (1). The Court of Appeal, being bound by the authority of *Holder's* case (1), necessarily held that Fenton had paid, or must be deemed to have paid, the interest in question, but your Lordships are not so bound.

It is not, I think, too much to say that, in deciding as they did in *Holder's* case (1), the Court of Appeal were largely, if not mainly, influenced by the views which they took of the basis and effect of the decision in the Scottish case of *Reddie* v. *Williamson* (5). As I understand the facts of that case, the pursuer had made himself liable as cautioner for what would be due by a customer on his current account with a bank up to a limit of £400, with interest. The account was kept with yearly rests, and, when the customer died, the balance last struck showed an indebtedness of over £800, which necessarily included a considerable amount of compound interest. The defender contended that the cautioner was liable for £400 and interest from the first date when the account showed a debit of £400. It was held that he was liable for only £400 with interest from the date of the balance last struck before the customer's death. The ground of the decision was that, although the bank could have recovered interest from the cautioner at the end of each year, they had chosen not to do so, but had accumulated it with capital; that they had thereby increased the credit given to the customer in exactly the same way as if they had taken from the customer a cheque in payment of the interest due, and had debited his account with the amount thereof; that, if the full £400 had been previously drawn out, every such cheque for interest would have been an unauthorised overdraft, for which the cautioner could not have been made liable; and that it made no difference that, without the drawing of a cheque, the same amount was treated as a principal sum drawn out, and debited to the account.

My Lords, I think that, rightly considered, that decision does not rest on the view that the interest was paid in fact, or was deemed to be paid, but on the view that the liability of the cautioner could not be increased by treating the customer as a debtor for a principal sum in respect of interest which he had not paid.

It is not an authority which would justify us in holding that the requirements of sect. 36 (1) are complied with where, as here, all that has happened is that, because the interest has not in fact been paid, the creditor has added the amount of the unpaid interest to the debtor's principal indebtedness. In my opinion, interest which is so dealt with cannot be interest "paid to the bank," still less can it be interest "paid to the bank without deduction of tax out of profits or gains brought into charge" within the meaning of that section. I would dismiss the appeal.

Lord Macmillan: My Lords, two questions were argued on this appeal: (i) whether certain interest on loans to Fenton by his bankers was "paid" by him within the meaning of the Income Tax Act, 1918, s. 36 (1), and (ii) whether the interest, if paid, was paid "out of profits or gains brought into charge to tax" within the meaning of the same enactment.

The special commissioners before whom the matter came in the first instance, without deciding whether the interest in question had in fact been paid, held that, even if it had been paid:

> it was not paid out of profits and gains charged to income tax but had been paid out of further advances from the bank in question.

On a case stated, Finlay, J., and the Court of Appeal, in view of the previous decision of the Court of Appeal in *Inland Revenue Comrs.* v. *Holder* (1), regarded themselves as bound to hold that the interest in question had been paid, or must be deemed to have been paid, within the statutory meaning. Dealing with the second question, FINLAY, J., held that the interest which he assumed to have been paid had not been paid out of profits or gains brought into charge to tax. So did the majority of the Court of Appeal (LORD WRIGHT, M.R., and ROMER, L.J., GREENE, L.J., dissenting). The decision of the special commissioners has thus so far been upheld.

The judgment of the Court of Appeal in *Holder's* case (1) is not binding on your Lordships, for, although the case came on appeal to this House, and the judgment below was affirmed, it was here decided on a different point, and the question of the soundness of the view taken by the Court of Appeal as to what constituted payment within the meaning of the statute was expressly reserved by your Lordships.

The appellant, the trustee of the estate of Fenton under two deeds of arrangement, thus comes to this House with a decision in his favour on the first question and a decision against him on the second question. The Crown, as it is entitled to do, challenges the soundness of the decision on the first question, and thus in effect brings under review the principle of the decision of the Court of Appeal in *Holder's* case (1). If the Crown succeed in establishing that the interest in question was not " paid " within the statutory meaning, it will be unnecessary to proceed to consider the second question, for, if the interest was not paid at all, the question of whether it was paid out of profits or gains brought into charge to tax does not arise.

The facts of the case are simple. Fenton at all material times had loan accounts with the National Bank, Ltd., and the Halifax Commercial Banking Co., Ltd. (subsequently the Bank of Liverpool and Martins, Ltd.), on which he had drawn large sums. The practice of the banks was to debit Fenton's accounts at the close of each half-year with the interest accrued, and to carry the balance forward to the next half-year. As the balance carried forward included the amount of the interest accrued in the preceding half-year, the result was that the interest debited at the end of the next half-year included interest on the interest accrued in the preceding half-year. In effect, by thus adding interest to principal half-yearly, the banks charged Fenton with compound interest.

No question arises with regard to Fenton's loan account with the National Bank, Ltd., as to which the commissioners state that " the whole of the interest was paid and eventually the account was in credit." As regards the loan accounts with the Halifax Commercial Bank, Ltd., in each of the calendar years 1920 and 1921, when interest fell due half-yearly on June 30 and Dec. 31, Fenton did not make any payment to the bank, and the bank at the end of each half-year simply debited the accounts with the accrued interest and carried the balance forward, charging interest at the end of the succeeding half-year on the accumulated principal and interest, and so on.

The Income Tax Act, 1918, s. 36 (1), upon which the present controversy arises, provides as follows :

> Where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of A
> the interest.

For each of the tax years to Apr. 5, 1921, and Apr. 5, 1922, Fenton claimed that the action of the bank in debiting with his consent to his loan accounts half-yearly the accrued interest, and in carrying forward the accumulated sum, constituted, as between him and the bank, pay- B
ment at each half-yearly period of the interest then falling due. He accordingly maintained that in the tax year to Apr. 5, 1921, he had in this way paid £27,076 10*s.* 10*d.* of interest to the bank, without deduction of tax, on the bank's advances to him. As, after allowing for deductions and repayments, he paid income tax for the year to Apr. 5, 1921, on C
£7,777, he claimed that the sum of £27,076 10*s.* 10*d.* of interest had, to the extent of £7,777, been paid out of profits or gains brought into charge to tax, and that he was accordingly entitled to repayment of tax on £7,777 under the section above-quoted. He submitted similar calculations for the fiscal year to Apr. 5, 1922, bringing out a claim for D
repayment for that year of tax on £2,722.

My Lords, it is a condition of a claim for repayment of tax on bank interest under sect. 36 (1) that the taxpayer shall have "paid" to his bank the interest in respect of which he claims repayment of tax. In my opinion, this means that the taxpayer must really, and not merely E
notionally, have paid the interest. There must be payment such as to discharge the debt. The payment must be a fact, not a fiction.

What justification can there be for holding that Fenton in the year to Apr. 5, 1921, "paid" to the bank a sum of £7,777 in discharge *pro tanto* of the interest charges of £27,076 10*s.* 10*d.* which he incurred to F
them in that year ? What happened was that Fenton did not pay the interest due by him at June 30 and Dec. 31, 1920, and it was because he did *not* pay it that it was debited to his loan account on each half-yearly occasion and the accumulated sum carried forward to the next half-year. The effect of this method of accounting between Fenton and G
the bank, it is suggested, was that, when the interest was debited to the loan account, Fenton ceased to owe it to the bank *qua* interest, and it became transmuted into an addition to the principal loan. The transaction at each half-year, it was said, when analysed, involved the following steps : a demand by the bank for the interest due, a request by Fenton H
for a further advance to enable him to pay the interest, an agreement by the bank to make this further advance, and, finally, the application by Fenton of this further advance to the payment of the interest, with the result that Fenton was entitled to maintain that he had "paid" the interest.

My Lords, the origin of this agreeable fiction whereby debts are to be deemed to be paid without payment may be traced historically to the ingenuity of lenders in devising a method of obtaining compound interest without contravening the usury laws. It was illegal by an antecedent contract to stipulate for the payment of compound interest,
A but, in the words of LORD ELDON, L.C., in *Ex parte Bevan* (2), at p. 224:

> . . . if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate, that you will forbear for six months upon those terms, [i.e., that the interest shall carry interest for the subsequent six months] that is legal.

On this principle it was held in *Eaton* v. *Bell* (3) that bankers who, with
B the knowledge of, and without objection by, their customers, debited them with interest with half-yearly rests in accordance with their general practice did not offend against the usury laws. This method of dealing with loan accounts, which became common form among bankers, survived the abolition of the usury laws, and is well-established as the ordin-
C ary usage prevailing between bankers and customers who borrow from them and do not pay the interest as it accrues.

It may well be that, as between a bank and its customer, this method of dealing may have the result that the accrued interest which the bank has, with the customer's assent, added to the principal loan thereby
D ceases to be due or recoverable as interest, but becomes merged in the principal loan. But has it been "paid"? In *Holder's* case (1), the Court of Appeal in holding that, on this method of accounting, the customer (in the words of ROMER, L.J., at p. 100) "must be deemed to have paid each half-year the accruing interest by means of an advance made for
E that purpose by the bank" to the customer, were largely influenced by the views expressed by LORD PRESIDENT (then LORD JUSTICE-CLERK) INGLIS and LORD COWAN in the Scottish case of *Reddie* v. *Williamson* (5). The pursuer in that case was a party as cautioner to a cash credit bond whereby the British Linen Bank agreed to allow the pursuer's son credit
F upon current account to the amount of £400, and the pursuer bound himself to pay up to that amount whatever should be due upon the account when demanded, with the due and lawful interest of the same from the time of advance until repayment. The principal debtor died insolvent, and, at the last balance, on May 30, 1849, before his death, the account
G was at debit to an amount exceeding £800, composed to a large extent of compound interest calculated with annual rests, according to what was described as "the invariable practice of bankers." The defender was the agent of the British Linen Bank at Kinross, and the pursuer in the action sued him for an accounting as his factor or agent, complaining,
H *inter alia*, that he had paid to the bank out of his funds, in settlement of his liability under the cash credit bond, more than was legally due. The defender's contention was that the sum found due at the last balance before the death of the principal debtor was composed partly of principal and partly of interest, and that the pursuer was liable to the bank for:

> £400 of principal and in addition for all the interest that may have accrued on that

> sum for however long a period and though the whole of it has from time to time been added to and accumulated with principal.

The court held that the utmost extent of the pursuer's liability was for :

> £400 of principal with interest thereon from May 30, 1849, all previous claim for interest having been extinguished by its being converted into principal.

My Lords, I think it is important to have in mind the nature of the action, as I have described it, in reading the language employed by the Lord Justice-Clerk and Lord Cowan, to which so much weight was given by the Court of Appeal in *Holder's* case (1). The question was whether the debit items of accrued interest, which, according to the practice of the bank, had been debited to the account at the end of each year, and on which interest was thereafter charged, were capital debits attributable to the £400, or retained their character of interest. There was no suggestion that the debits had been discharged by payment. The question was one of construction of the cash credit bond, to which the cautioner was a party, and it was held that the parties must have had in view that the account would be kept according to the invariable practice of bankers. It is true that, in explaining that practice, the Lord Justice-Clerk said, at p. 237, that the method pursued by the bank of accumulating the interest with the capital annually was the same :

> as if the leading obligant, instead of paying the interest otherwise at the end of the year, had given the bank a cheque for the amount on the cash-credit account, with which the bank extinguished the interest, and then placed the amount of the cheque to the debit of the cash account as an ordinary draft.

He added later, at p. 237 :

> the privilege of a banker to balance the account at the end of the year, and accumulate the interest with the principal, is founded on this plain ground of equity, that the interest ought then to be paid, and, because it is not paid, the debtor becomes thenceforth debtor in the amount, as a principal sum itself bearing interest.

Lord Cowan said in less precise language, at p. 240 :

> By being carried into the account each year, and converted into principal, the interest was paid to the bank, and could not afterwards be revived as interest to suit their convenience or profit.

It may well be that, in a question between a bank and its customer, and equally between a bank and its customer's cautioner, the interest accruing annually may, by the sanctioned method of accounting, cease to be interest when it is accumulated with the principal, so that the bank can thereafter no longer sue for the interest as interest. Your Lordships have not had the advantage of hearing the views of any representative of banking interests, and I should not wish anything that I say now to be taken as affecting any questions which may arise as between banks and their customers. It is manifest, however, that it is only by a legal fiction that the interest in such cases as the present can be said to have been paid. After, as before, the striking of the balance, the same sum remains due, no longer, it may be, as interest, but still due as part of the principal debt. In construing the extent of the cautioner's liability under the cash

credit bond, the court would appear to have been well-founded in their view that the bank's own method of accounting, assented to by the principal debtor, and recognised as ordinary practice, precluded any claim for past interest as interest prior to the last balance. The cautioner was liable for whatever was drawn upon the cash credit account up to
A £400, and the unpaid interest was debited in account just like the ordinary drafts upon it, and became part of the principal debtor's capital indebtedness, for which the cautioner was liable up to £400, with interest subsequent to the last balance.

It is quite a different matter, however, when the question is as to
B whether the interest in such a case has been "paid" within the meaning of sect. 36 of the Income Tax Act. In my opinion, the phrases which I have quoted from the opinions of the LORD JUSTICE-CLERK and LORD COWAN were used in an entirely different context, and to apply them to the present question would be to misapply them. As I have already said, what the
C Income Tax requires as the condition of repayment of tax on interest is that the sum due as interest shall have been actually discharged, not merely constructively paid. To warrant repayment of tax, there must have been a real payment of tax, and a real payment of interest without deduction of tax.

D It is right to notice the point on which GREENE, L.J., laid stress in his judgment—namely, that the purpose of sect. 36 is presumably to avoid the double exaction of tax. I take it to be the case that a bank, in making up its return of profits or gains, brings into account the accrued interest on its loan accounts, whether paid or unpaid and accumulated, with the
E result that the unpaid and accumulated interest becomes a factor in computing the balance of its profits or gains on which, if a credit balance is shown, tax is paid. Indeed, it is, by the proviso to sect. 36, a condition of repayment of tax on interest that the interest be brought into account in the recipient's income-tax return, and in the present case we were
F asked to assume that this had been done. Nevertheless, the fact that the banks treat the accrued and accumulated interest in this fashion as an item of income in their income-tax accounts does not, in my opinion, necessarily lead to the view that the customer has paid this interest within the statutory meaning. At worst, the result may be that sect. 36
G affords only an imperfect remedy against double taxation. Indeed, the relief given in the matter of tax on interest by sect. 36 is conferred only in the case of interest paid to certain specified types of lenders, and there are, of course, many instances where money which A. pays out of his taxed income to B. is charged again with income tax in the hands of B.

H The mischief of double taxation occurs where the same income is twice charged with tax. Where a person pays his current obligations out of his income, the money paid in the general case becomes the income in turn of the recipient, and the incomes of the payer and the payee may both be taxed without double taxation in the proper sense. Sect. 36, in giving relief in certain cases of payment of interest, qualifies this general principle in these instances, and various explanations, none of them entirely satisfactory, have been suggested as to the principle on which the relief is given. One suggestion has been that the bank customer, in paying interest to the bank, is sharing or distributing one income as between himself and the bank, and that, accordingly, one income should bear only one tax. I do not find this convincing. Whatever may be A the justification for treating the payment of interest in certain cases in this special fashion, it may well be, as so often happens in income-tax legislation, that what has been enacted does not completely achieve what was intended. At any rate, I am satisfied that sect. 36 (1) does not cover the present case, whether it truly involves double taxation in the strict B sense or not.

My Lords, if your Lordships are in agreement with me, it becomes unnecessary to consider the second question, and your Lordships are once more deprived of an opportunity of considering the true meaning of payment " out of profits or gains brought into charge " in relation C to the case of *A.-G.* v. *Metropolitan Water Board* (7), on which topic the judges of the Court of Appeal have said much that is interesting and important. I concur in the motion that the appeal be dismissed with costs.

D

LORD MAUGHAM: My Lords, it is unnecessary to repeat the circumstances in which this appeal comes before your Lordships, since they have been amply stated. Indeed, but for the fact that we have been invited to overrule one of the grounds for the decision of the Court of Appeal—namely, the case of *Inland Revenue Comrs.* v. *Holder* (1)— E I should have added nothing to the opinions of my noble and learned friends LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

In *Holder's* case (1), as in the present one, the question arose as to whether a taxpayer was entitled to repayment of tax under the Income Tax Act, 1918, s. 36 (1), which is in the following terms: F

> Where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest.

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Sect. 36 (2) provides for similar relief:

> on the like proof [in the case of advances from a person] *bona fide* carrying on business as a member of a stock exchange in the United Kingdom [or a person] *bona fide* carrying on the business of a discount house in the United Kingdom.

Subsect. (1) corresponds with the Finance Act, 1915, s. 22, subsect. (2) H with the Finance Act, 1917, s. 25. It will be remembered that the well-known and ancient rule, now r. 21 of the All Schedule Rules (resembling in some respects r. 19), applies to " payment of any interest of money, annuity or other annual payment charged with tax, etc." It provided that the interest-payer should deduct the amount of the tax and account

for the same to the commissioners. There was originally no such right in the case of short loans (including overdrafts) from banks ; in such cases, interest had to be paid without deduction. The right to recoupment was not given by the legislature till 1915, and, it is said, was then conferred in order to facilitate during the War the raising of money on short loan
A from banks for the purpose of subscribing to government issues.

Under sect. 36 the interest must be (i) paid to the bank without deduction of tax, and (ii) so paid out of profits or gains brought into charge to tax. The bank's customer is then to be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on
B the amount of the interest.

In *Holder's* case (1), as in the present, nothing was actually paid by the customer in respect of the relevant advance or advances, either for principal or interest. In accordance with the usual practice of bankers in this country, the system adopted by the bank was that each
C half-year the accrued interest was added to the amount advanced (including therein any interest previously added to the original amount), and the total sum was carried forward into the next half-year as one capitalised sum. This is a mere matter of entries in the books of the bank, and the result is to give the bank compound interest on the amount due.
D According to the authorities, the customer could object, but at the risk of being called upon to pay the amount due from him. It is not quite clear that his acquiescence in the account being kept on such a basis can be inferred simply from his receipt of a single pass-book or other account and his return of it without comment. Something may turn upon the
E other circumstances of the case, and acquiescence might doubtless be inferred from a course of business : see *Bank of England* v. *Vagliano Brothers* (8), at pp. 116, 128. The question, however, arises, assuming the entries in the bank books to have been made with the assent of the customer, as to whether he has paid the interest each half-year to the
F bank.

In *Holder's* case (1) the Court of Appeal, relying on several cases which were dealing with the position as between the bank and the customer, held that the latter must be deemed to have paid the accruing interest half-yearly to the bank by means of advances made for that purpose by
G the bank to the customer. Those cases have been carefully considered by your Lordships, and I shall serve no useful purpose by making a further criticism or explanation of them. In particular, I agree that there is nothing in the cases which can lead us to the conclusion that the customer has paid the interest in the circumstances we are considering.

H I venture to add some reasons on the construction of the section which have led me to the conclusion that something more than book entries made by the bank would be required to satisfy the section. In the first place, I would observe that the legislature must be taken in 1915 to have been fully conversant with the usual practice of banks in the United Kingdom in relation to short loans and overdrafts. Unless that practice were departed from, there would always be a payment of interest by the customer—that is, either an actual payment or an apparent payment by an entry in the account. Yet the section takes care to provide that the facts must be proved to the satisfaction of the special commissioners. Subsect. (2) requires " the like proof " of payment in the case of members of a stock exchange in the United Kingdom, yet it would seem reasonable to suppose that in such a case actual payment is required.

Next, it is difficult to see why payment of interest by the customer is required as a condition precedent to his right to repayment of tax unless the payment has actually been made in some shape or form. The requirement seems to have been borrowed and adapted from r. 21, or rather from its earlier form in the Customs and Inland Revenue Act, 1888, s. 24 (3). The legislature may well have thought that, if the customer never in fact paid the interest—e.g., if he became wholly insolvent—he ought not to have a claim to repayment of tax on the interest, even if the interest were to be brought into account by the bank in the statement delivered to the commissioners. If the practice of bankers is to be sufficient to prove a payment, I cannot understand why the Finance Act, 1915, s. 22, was framed as it was.

Finally, it is to be noted that the payment is expressed to be " out of profits or gains brought into charge to tax." Without attempting to explain this somewhat cryptic phrase, it is, I think, reasonably clear that it imports such a payment by an exercise of volition on the part of the payer; and that it points in the direction of something more than could be established by the presumption of an advance by the bank, applied *nolens volens*, so far as the customer is concerned, in discharge of accrued interest due by him.

My Lords, these reasons, as well as those stated by my noble and learned friends, which I will not stay to repeat, have led me to the conclusion that *Holder's* case (1) cannot be supported, so far as it decided that the customer must be taken to have paid the interest on the advance due by him by means of further periodical advances made for that purpose. If this is correct, it must follow that the present appeal must fail, since one of the conditions on which the taxpayer is entitled to repayment of tax—namely, payment of interest to the bank—has not been satisfied. I therefore concur in the proposed motion.

Appeal dismissed with costs.

Solicitors: *Blundell, Baker & Co.*, agents for *Mumfords & Gordons*, Bradford (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

OXFORDSHIRE COUNTY COUNCIL *v.* OXFORD CITY COUNCIL.

[COURT OF APPEAL (Greer and MacKinnon, L.JJ., and Bennett, J.), **February 3, 4, 7, March 7, 1938.**]

Local Administration—Extension of city boundaries to include part of county area—Loss to county ratepayers—Whether city council liable to compensate county council—Local Government Act, 1888 (*c.* 41), *s.* 62*—Local Government Act,* 1894 (*c.* 73), *s.* 68, *Schedule I, Part II—Local Government* (*Adjustments*) *Act,* 1913 (*c.* 19), *s.* 1 (1) (*b*)*—Local Government* (*County Boroughs and Adjustments*) *Act,* 1926 (*c.* 38), *s.* 5*—Oxford Extension Act,* 1928 (*c. lxxxiv*), *ss.* 33, 61*—Local Government Act,* 1929 (*c.* 17), *ss.* 30, 134.

By the Oxford Extension Act, 1928, certain areas, profitable from a rating authority's point of view, were transferred from the appellants to the respondents. By the Local Government Act, 1929, liability to repair roads was in certain cases transferred to county councils. The appellants, the county council, claimed that this involved them in a loss which was a result of the Oxford Extension Act, 1928, and for which they were entitled to be compensated by the respondents, by reason of the Local Government (Adjustments) Act, 1913. The Oxford Extension Act, 1928, came into force 4 days after the Local Government Act, 1929, received the Royal Assent, but the Act of 1929 did not come into force until a year later:—

HELD (BENNETT, J., dissenting): this loss to the appellants was a result of the Oxford Extension Act, although no such loss would have followed but for the passing of the Local Government Act, 1929. The appellants were therefore entitled to an adjustment.

[EDITORIAL NOTE. There is a difference of judicial opinion in this case as to the right of the county council to receive compensation for additional burdens. The additional burdens were due to the passing of the Oxford Extension Act of 1928 which came into force after the Local Government Act, 1929, was passed. The latter Act, however, did not come into operation until 1930, a year after the coming into operation of the Oxford Extension Act, 1928. The right to compensation depends upon whether in law the additional burden is due to the local Act extending the boundaries of the City or to the public general Act. The majority has said that it is attributable to the local Act, and that compensation is therefore payable. The Court of Appeal would seem to favour the view that the court should state the reasons for their answers to a consultative case now that there is an appeal in such cases.

AS TO ADJUSTMENT OF BURDENS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 250-252, para. 451; and FOR CASES, see DIGEST, Vol. 33, pp. 25-27, Nos. 113-132.]

Cases referred to:

(1) *Caterham Urban District Council* v. *Godstone Rural District Council,* [1904] A.C. 171; 33 Digest 26, *124*; 73 L.J.K.B. 589; 90 L.T. 653; *revsg.* S.C., [1903] 1 K.B. 554.

(2) *Godstone Rural District Council* v. *Croydon Corpn.* (1932), 102 L.J.K.B. 34; Digest Supp.; 148 L.T. 87.

(3) *West Hartlepool County Borough Corpn.* v. *Durham County Council,* [1907] A.C. 246; 33 Digest 25, *115*; 76 L.J.K.B. 859; 97 L.T. 114; *revsg.* S.C., [1906] 2 K.B. 186.

APPEAL from a judgment of the Divisional Court, dated May 24, 1937. The facts and the previous proceedings are set out in the judgments.

R. M. Montgomery, K.C., and *S. Cope Morgan* for the appellants, the County Council.

Hon. Sir Stafford Cripps, K.C., Maurice FitzGerald and *R. D. Stewart-Brown* for the respondents, the City Council.

GREER, L.J.: This is an appeal from the decision of the Divisional A
Court of the King's Bench Division on questions asked by an arbitrator
appointed to adjust certain financial relations that required adjustment
by reason of the extension of the boundaries of the city so as to include
part of the area of the county. The Divisional Court answered the
questions in favour of the city, without giving any reasons for their B
decision. The question on the appeal is whether the order of the
Divisional Court was right or not. The questions which the Divisional
Court were asked to answer were stated in a consultative case, not in
an award in the form of a special case. In such cases there had been a
well-established practice of the Divisional Court when there was no C
appeal from their decisions of answering the questions put to the court
in the affirmative or the negative without stating their reasons. I doubt
whether this practice ought to be followed now that a right of appeal
from the decisions of the Divisional Court to the Court of Appeal has
been established by law, but, be that as it may, with regard to proceedings D
in the Divisional Court, we are satisfied that, on appeal, reasons ought
to be stated, as they would be, and have been, in cases where an arbitrator
has made his award in the form of a special case.

In order to decide this appeal, we have to consider the effect of several
statutes and of the decisions thereon. Provision was made in the Local E
Government Act, 1888, for adjustments of property, debts, and liabilities
as between counties and boroughs, when the boroughs were extended so
as to take in a part of the county. In 1904 it was decided by the House
of Lords in *Caterham Urban District Council* v. *Godstone Rural District
Council* (1), that the Local Government Act, 1888, did not give an F
arbitrator power, when he was making an adjustment under the Act of
1888, to take into account the loss to the ratepayers occasioned by taking
from a rural district council a valuable rateable area. This was considered to operate unjustly in favour of the ratepayers of the council
whose district was extended, and against the ratepayers of the rural G
district council, who had been deprived of part of their area, and the
Local Government (Adjustments) Act, 1913, was passed to remedy this
injustice. That Act provided by sect. 1 (*b*) that, on any adjustment
under sect. 32 or under sect. 62 of the Local Government Act, 1888, or
under the Local Government Act, 1894, s. 68, provision should be made H
for the payment to any authority of such sum as seemed equitable in
accordance with the rules contained in Part II of the schedule to that
Act, in respect of any increase of burden which would properly be thrown
on the ratepayers of the area of that authority in meeting the cost
incurred by that authority in the execution of any of their powers and

duties as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place. In Part II of the schedule it was provided that regard should be had to (*a*) the difference between the burden on the ratepayers which would properly be incurred by the authority in meeting the cost of executing any of their powers A and duties, and the burden on the ratepayers which would properly have been incurred by the authority in meeting such cost had no alteration of boundaries or other change taken place, and (*b*) the length of time during which the increase of burden might be expected to continue. It is specially to be noted that the statute is concerned, not with any B increase of burden on the authority, but with an increase on the ratepayers of the area of the authority from whose district part of the rateable value has been taken.

On Aug. 3, 1928, a private Act of Parliament, the Oxford Extension Act, 1928 (c. lxxxiv), was passed. This Act provided for the inclusion C in the city of Oxford of certain parts of the adjoining districts then within the area of certain rural and urban districts. The Act was to come into force on the appointed day, and the day appointed was Apr. 1, 1930.

By the Local Government Act, 1929, the liability to repair roads, D which had formerly rested on the said rural and urban councils, and the liability formerly resting on the guardians to provide for the poor of their districts were transferred to county councils. This Act came into operation exactly one year after the Oxford Extension Act, 1928. A claim was then made by the county council with regard to the loss which E they alleged was occasioned to the ratepayers of the county council by reason of the extension of the borough of Oxford, which had the effect of improving the rateable area of the city council and increasing the burden on the ratepayers in the county, and Sir Lynden Macassey was duly appointed to make all the proper adjustments under the Act F of 1888, as modified by the Act of 1913. The arbitrator was asked to state a consultative case, and he did so, stating four questions, which are set out in para. 2 of the case, on which he desired the opinion of the court. Thereafter, a claim was made in *Godstone Rural District Council* v. *Croydon Corpn.* (2) in respect of the loss the Godstone Rural District G Council ratepayers had suffered by reason of the extension of the borough of Croydon. This claim came in the first instance before ROCHE, J., on an award stated in the form of a special case, and afterwards on appeal before the Court of Appeal. As stated in the headnote, it was held by ROCHE, J., as follows:

H

> Held, (1) that in determining, in 1932, the amount to be paid to the rural district council by the corporation in respect of the increase of burden thrown on the ratepayers of the rural district in meeting the cost of maintenance of roads in the rural district in consequence of the transfer of the parish from the rural district to the county borough, the arbitrator must take into account the passing and coming into effect of the Local Government Act, 1929, under which the county council became on Apr. 1, 1930, the highway authority; (2) that in determining the amount no compensation should be given for any period after Apr. 1, 1930.

The decision of Roche, J., was confirmed in the Court of Appeal. In the course of his judgment, Scrutton, L.J., used these words, at p. 37:

> The Surrey County Council are not parties here, and nothing that I say is binding on them; but if the parties had chosen to take what I should have thought was the sensible course, namely, to get the three bodies together: the Surrey County Council, the Croydon Corporation and the Godstone Rural District Council, and had agreed that Sir Lynden Macassey should decide the matter once and for all between them, it would have saved a great deal of cost and delay. I am not deciding anything about the liabilities of the Surrey County Council.

It seems to me that in this part of his judgment Scrutton, L.J., seems to have thought that the Surrey County Council were entitled to have some say in the question as to whether their ratepayers should have relief in respect of the loss which their ratepayers had suffered by reason of the joint effect of the Extension Act and the Act of 1929. Otherwise there would have been no reason to say that the matter should have been dealt with by some arrangement to which the Surrey County Council would be a party. But he expressly refrained from deciding the point, as the county council were not parties to the appeal. The district councils, whose ratepayers for one year lost the advantages they would have had if their districts had not been transferred to the Oxford City Council, have been paid, and have accepted, a sum of money in satisfaction of the amount due for the year in which they suffered the loss, and no question arose in the arbitration between the county council and the city council with regard to the loss incurred during the year in question by the ratepayers of the county then under the jurisdiction of district councils, but the Oxford County Council made a claim to have the loss of their ratepayers, which they said was the consequence of the Oxford Extension Act, 1928, considered by the arbitrator when he came to make the necessary adjustments between county and city. The question involved in the appeal is whether the decision of the Divisional Court, which would have the result of depriving them of that compensation, was right or not. By the Act of 1913 the limit was made 15 years, but this was afterwards altered to 21 years in respect of roads, though with regard to poor rate it remained at 15 years. Accordingly, the claim of the county council was based on 20 years in respect of the roads, inasmuch as compensation had already been paid in respect of one year to the district councils, and they claimed in respect of 14 years for the loss occasioned by their having to pay poor rates for the reduced area of the council. The question we have to determine is whether the loss to the county council can properly be called a consequence of the Extension Act. I think it can be said to be a result of the Extension Act, notwithstanding the fact that no such consequence to the ratepayers in the area of the county council would have followed but for the passing of the Act of 1929. Assume, for the purpose of this appeal, that the arbitrator may find, when he comes to adjust the figures, that the ratepayers in the area of the county council have incurred a loss, the amount of which he will determine, by reason of the ratepayers in that area having had their burdens increased through the taking away of some portion of the area where there was great rateable value, and through having left on them the burden of the upkeep of the secondary roads in their county and the maintenance of the poor, without the assistance which, but for the extension, they would have obtained in the rateable areas taken from them, it seems to me that such added burden can rightly be said to be a consequence of the extension of the boundaries of the city of Oxford. Any other view would leave the ratepayers in the county without the relief to which I think they would be entitled by reason of the provisions of the Act of 1913, and would give an advantage to the ratepayers of the city which they have received by reason of the extension.

For these reasons, I think that the answer which we should give to the legal question propounded in para. 2 of the case is that the ratepayers of the county are entitled to have made by the arbitrator an adjustment which will compensate them for the added burden of increased rates, due to the taking from the county of a valuable rateable area. I think that the answer of the court should be that the county council are entitled to have the arbitrator consider the question stated in para. 2 (*a*), (*c*), of the case. In my judgment, the county council will be entitled, when the arbitrator is making his adjustment, to allege and prove that the ratepayers of the county have suffered an increase of burden in the rates they have to pay to the county council as a consequence of the alteration of the boundaries effected by the Oxford Extension Act. It seems to me that this is a logical result of the decision in *Godstone Rural District Council* v. *Croydon Corpn.* (2). In that case, it was decided that the arbitrator was in law bound to hold that he could not consider any loss to the ratepayers under the jurisdiction of the Godstone Rural District Council for any period beyond the two years during which they remained under the jurisdiction of that rural district council. In my judgment, if that case is to be regarded as correctly stating the *ratio decidendi*, as I think it does, it means that in making the adjustment the arbitrator has to ask himself the question : " Have the district council established that their ratepayers have suffered any loss beyond the two years during which some of their ratepayers remained under the jurisdiction of the area of the district council ? " It seems to me logically to follow that, when the arbitrator comes to make his adjustment between the county council and the city council, he must ask himself the question : " Have the county council established to my satisfaction that their ratepayers will suffer a loss through the increased rates they will have to pay as a consequence of the Oxford Extension Act ? " If he finds that the county ratepayers have in fact suffered such a loss, he will have to make an adjustment providing for a sum to be paid to the county council as compensation to their ratepayers for the loss so sustained.

For these reasons, in my judgment, the appeal should be allowed with costs here and below, and the answer of the court to the arbitrator should be that, in the adjustment he will make, he should act on the opinion of this court that he will be entitled to make provision for the differences, if any, stated in para. 2 (*a*), (*c*), of the case.

MacKinnon, L.J.: This is an appeal from the Divisional Court on a special case stated by an arbitrator for the opinion of that court.

By the Oxford Extension Act, 1928, its provisions were to take effect as from the appointed day, which was Apr. 1, 1929. By sect. 4 of that Act certain areas previously outside the city (for example, part of the Headington Rural District) were transferred within the city. This meant that rateable hereditaments in the transferred portion of the rural district would henceforth pay their rates to the city. They had, of course, previously paid rates on a demand note from the Headington Rural District Council, which would be a general rate, including (*a*) the rate recoverable by the county council in respect of county council services, such as main roads, county police, and education (this being collected in the general rate by virtue of a precept from the county council to the rural district council), and (*b*) the rate required by the rural district council itself in respect of services, such as the upkeep of minor roads, sanitation, etc., entrusted to the rural district council.

The Oxford Extension Act, 1928, s. 33, provides for the adjustment of financial relations between the city and the county, and makes the Local Government Act, 1888, s. 62, apply. Sect. 61 also refers to sect. 62 of the Act of 1888. For some mysterious reason, sect. 33 also refers to "any other county borough," when no other county borough can conceivably be involved. I can only suppose that the draftsman was determined to leave no stone unturned in his quest for obscurity. One result of the transfer of part of a rural area to an urban area may be to impose on the ratepayers remaining in the diminished rural area an added burden. The part transferred, being on the outskirts of a growing town, is likely to be more densely covered by rateable hereditaments than is the more remote and more rural remainder. The rates previously collected in that transferred area may have been profitable to the county council and the rural district council in the sense that they have been more than sufficient (for example, by £1,000) to pay for the services rendered in that area by the county council and the rural district council respectively. It has, in fact, been what has been called in some cases "a beneficial area." When such a beneficial area has been transferred to an urban area, the remaining ratepayers in the part of the rural area not transferred may have to pay rates on a higher scale than before, for there will no longer be available to the county council and to the rural district council, for the discharge of their duties in the diminished area, the surplus of the rates previously accruing to them from the transferred area over and above the cost of those services in the transferred area.

It was at one time thought that this added burden on the ratepayers of the untransferred part of the rural area could be recovered from the authority of the urban area, on behalf of such ratepayers, by the rural district council or the county council, under the Local Government Act, 1888, s. 62. That this was an erroneous view was decided by the House of Lords in *Caterham Urban District Council* v. *Godstone Rural District Council* (1). This decision was repeated, and emphasised, in *West Hartlepool County Borough Corpn.* v. *Durham County Council* (3).

The result of those decisions was that in such a case the surviving ratepayers of the rural area were without relief from the extra burden added to their shoulders through the transfer of their former, and more opulent, brother ratepayers to the urban area. It was obviously in order to give them such relief, and to counteract the effect of these decisions, that Parliament enacted the Local Government (Adjustments) Act, 1913, by way of amendment to the Local Government Act, 1888, s. 62. That provided by sect. 1 (1) (*b*):

> Provision shall be made for the payment to any authority of such sum as seems equitable in accordance with the rules contained in Part II of the schedule to this Act, in respect of any increase of burden which will properly be thrown on the ratepayers of the area of that authority in meeting the cost incurred by that authority in the execution of any of their powers and duties as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place.

Part II of the schedule provides:

> (1) Regard shall be had to: (*a*) the difference between the burden on the ratepayers which will properly be incurred by the authority in meeting the cost of executing any of their powers and duties and the burden on the ratepayers which would properly have been incurred by the authority in meeting such cost had no alteration of boundaries or other change taken place; (*b*) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under Part I of the schedule shall be taken into account. (2) The sum payable to any authority in respect of the increase of burden shall not exceed, or, if payable by instalments or by way of annuity, the capitalised value of the instalments or annuity shall not exceed [the average annual increase of burden multiplied . . . by fifteen.] (3) Any sum payable in respect of the cost of the maintenance of main roads shall be payable by way of annuity.

The word "fifteen" at the end of subsect. (2) has been altered to "twenty-one," in regard to the cost of maintaining roads, by the Local Government (County Boroughs and Adjustments) Act, 1926, s. 5.

It is, I think, of importance to observe, and to keep firmly in mind, that the compensation to be claimed by one authority from another, pursuant to this Act of 1913, is in respect of the burden on its ratepayers. The object is the benefit or relief of those ratepayers, by counteracting the increase of rates that might otherwise be imposed on them, but there is no conception, at any rate not directly, of the authorities as income-receiving bodies, one of whom, by the transfer, has had its income increased, while the other has had its income diminished, and no conception of the latter authority being therefore compensated by the former.

The special case in para. 7 finds as a fact that :

> an increase of burden was thrown on the ratepayers of the said rural districts in meeting the cost incurred by the said rural district councils in the execution of their powers and duties as a road authority in consequence of the said extension [of the city].

This refers to one of the specific matters (the cost of road maintenance) A in dispute in this case. It was stated by counsel, however, and agreed, that this means that, by reason of part of, for example, the Headington Rural District being transferred to the city, there was an added burden on the remaining ratepayers of the Headington Rural District because of the transfer to the city of a beneficial area. That increased burden B of rates would be (*a*) in respect of the county rate, for education, county police, main roads, etc., and (*b*) in respect of the rural district part of the general rate for rural district services, including such road maintenance as was the duty of the rural district council. It was further stated, and agreed, that the city has conceded that, pursuant to the Act of 1913, it C must pay to the county council, in respect of this added burden on their ratepayers for such things as education, county roads, etc. Also the city concedes that it must pay to the rural district council, in respect of the added burden on its ratepayers, for rural district services, so far as those services existed as a duty of the rural district council on Apr. 1, D 1929, the date when the Oxford Extension Act, 1928, took effect. The particular dispute as to the extra burden on the ratepayers in respect of the cost of road maintenance, however, arises from another outbreak of legislative activity. The Local Government Act, 1929, received the Royal Assent on Mar. 27, 1929, four days before the Oxford Extension E Act, 1928, began to operate. By sect. 30 of this Act, the duty of maintaining roads previously discharged by a rural district council was transferred, as from the appointed day, to the county council. By sect. 134, the appointed day means Apr. 1, 1930, one year after the appointed day under the Oxford Extension Act, 1928.

F The city, in these circumstances, say in effect : "We agree that, if the Local Government Act, 1929, had not been passed, we should, under the Act of 1913, have been liable to pay to the rural district council, in respect of the added burden on its ratepayers for road maintenance, and by a calculation not exceeding 21 years of that added burden ; G but, as the rural district council has had to discharge the duty of road maintenance for one year only, we are liable to pay for that one year only. The county council having taken over that duty, claims that it can recover from us for the remaining 20 years. That we are not liable to pay. The burden on the county council is not a result of our Oxford H Extension Act, but is only a result of the Local Government Act, 1929." That this properly represents the position taken up by the city is, I think, apparent, if one refers to the second contention of the city as set out in para. 19 (iv) of the special case :

> That any increase in the burden on the ratepayers of the county in the matter

of roads vested in the county council under the Local Government Act, 1929, or in the matter of public assistance, is not a consequence of the Oxford Extension Act, 1928, but of the Local Government Act, 1929.

So far as concerns the manifest intention of the Act of 1913, I think that this argument is based on the fallacy which I mentioned earlier, in order
A to deprecate its intrusion. It rests upon a notion of the county council and the city council being income-receiving entities, with certain duties for which they must pay out of their income. Hence the insistence that the burden of maintaining these roads was imposed on the county council by the Act of 1929.

B The matter with which we are really concerned, however, is the added burden on the ratepayers occupying rateable hereditaments in the rural area. Part of the rate they have to pay is for road maintenance. By reason of the Oxford Extension Act, as is found in the case, the burden of that was increased through the loss of the beneficial area. In 1929, the
C maintenance of the roads, for which this part of the general rate was levied, was done by the rural district council. In 1930, that maintenance was handed over to the county council, but the rate, and that portion of it required for road maintenance, would remain the same, with the possible difference that in 1930 the proportion of the general
D rate levied by the rural district council, under the precept of the county council, will have been a little higher than in 1929, while the proportion of the general rate levied by the rural district council for their own purposes will have been a little less in 1930 than it was in 1929. In other words, the burden imposed on these rural ratepayers by the Oxford
E Extension Act is exactly the same in 1930 as it was in 1929, though the work for the payment for which they paid this particular part of the general rate was done by a different authority.

That in respect of this added burden these ratepayers should be compensated by the city seems to me the manifest purpose of the Act of 1913.
F Then is there anything in the wording of that Act which compels me to defeat that purpose ? Before seeking to answer that question, I must refer to another case. The Godstone Rural District Council appears to be fired with a laudable ambition to elucidate the law of local government, and in 1932 they figured again in *Godstone Rural District Council*
G v. *Croydon Corpn.* (2). A special Croydon Act of 1927 transferred the parish of Addington from the Godstone Rural District to the borough of Croydon as from Apr. 1, 1928. Addington was a beneficial area to the rural district. In respect of the added burden on the ratepayers of the rural district for maintenance of roads, Croydon agreed to pay for the
H two years until Apr. 1, 1930, but when the 1929 Act transferred the road maintenance to the Surrey County Council as from Apr. 1, 1930, Croydon refused to pay any more, as Oxford City refuses in this case. Godstone Rural District Council accordingly claimed to recover from Croydon in respect of the remaining 19 of the 21 years, as agent or trustee

for the Surrey County Council. They relied strongly on the fact that, if their arbitration with Croydon had been promptly completed, and an award given before the passing of the 1929 Act, so that they had recovered for the 21 years, they would on Apr. 1, 1930, have had to hand over the unexpended portion of the sum so received from Croydon to the county council, pursuant to sect. 117 (4) of the Act of 1929. ROCHE, J., held that Godstone Rural District Council could not make good this claim, and he was affirmed by the Court of Appeal. Both ROCHE, J., and SCRUTTON, L.J., are careful to say that they are not deciding what ought to be the result, if the claim had been made, not by the Godstone Rural District Council, but by the Surrey County Council.

The present case accordingly raises the question thus reserved, and the question is as to whether the Oxford County Council can claim from the city in respect of the added burden on their ratepayers since Apr. 1, 1930, for road maintenance, by reason of the transfer on Apr. 1, 1929, of part of the Headington Rural District to the city, and the consequent loss of the beneficial area constituted by that part. I think the county council can so claim. Sect. 1 (1) (*b*) of the Act of 1913 enacts that:

> Provision shall be made for the payment to any authority . . . in respect of any increase of burden . . . on the ratepayers of the area of that authority. . . .

The county council is an authority. The county ratepayers are ratepayers of that authority. The burden on those ratepayers has been increased by the loss of the share of that burden borne before Apr. 1, 1929, by their brethren in the transferred area. The rate, as part of the general rate, is still collected by the rural district council. The only change (no change at all to the ratepayers, and probably unknown to all of them) is that the rural district council, instead of keeping the money for their work on these roads, hand it over to the county council which has taken over the work.

Upon the general question, therefore, propounded by the arbitrator at the end of the special case, I think that the answer is in the affirmative. There remains, however, a subsidiary question. Let the part of Headington Rural District transferred to the city be X, let the remainder of the rural district be Y, and let the county of Oxford outside the old rural district be Z. The case finds that X was a beneficial area as between X and Y. In my hypothetical figure, I assumed that in 1928 the rural district council collected from X £1,000 more in rates than they spent in X. Now that the county council are making the claim, they are making it for the ratepayers of Y and Z, but, as between X and Y plus Z, it may be that X would be a still more beneficial area than X was to Y, for Y itself may be a beneficial area as between Y and Z. If, therefore, the county council had been maintaining these roads in 1928, and had lost X by its transfer to the city, it might be that it would have lost £1,200, instead of the £1,000 lost by Y. In other words, though the ratepayers of Y, having lost the benefit from their fellows in X, had to pay more for the upkeep of roads in Y, their added burden may be even greater when they have, as ratepayers of Y and Z, to pay towards the upkeep of roads in Y and Z. To the extent of this added burden (in my hypothetical figures, £200)—that is, to the extent to which X would have A been in 1928 a more beneficial area to Y plus Z than in fact it was to Y—I think that the result is due, not to the Oxford Extension Act, 1928, but to the Act of 1929. To this extent, but to this extent only, I think that the contention of the city—that the increase of burden on the ratepayers " is not a consequence of the Oxford Extension Act, 1928, B but of the Local Government Act, 1929 "—is correct.

Something like this difference between the two states of things is reflected in the alternatives put in paras. A and B of sect. 19 (2) of the special case. What I have tried to indicate as being, in my view, the proper basis for the calculation of compensation approximates to B C rather than to A ; but I do not think that I assent in terms to B. I think that the claim is to be made by the county council on behalf of its county ratepayers (in Y plus Z), and not on behalf of the ratepayers in Y, as in B. In estimating the claim for the ratepayers in Y plus Z, however, the arbitrator ought to deduct such part of the claim, if any, as results, D for the reasons I have given, not from the Oxford Extension Act, 1928, but only from the Local Government Act, 1929. The resulting figure, I imagine, will probably be very much that which would come from the formula in B. I am conscious that all this imposes an appalling task on the arbitrator. However, as it would strain the combined intellects E of Aristotle and Sir Isaac Newton to achieve an impeccable award under these enactments, this additional complication is perhaps of little moment.

So far I have discussed this matter only in relation to the claim about maintenance of roads, arising on the first half of para. 7 of the special F case, and the alternatives A and B in para. 19 (2). There remains the problem about poor law expenses under the second half of para. 7 and the alternatives C and D in para. 19 (2). This involves an even more maddening confusion, first, by the transfer under the Act of 1928 of part of the Woodstock Union to the Headington Union (so that the remainder G of the Woodstock area was left wholly in the county, and part of the Headington Union was in the city and part in the county), and, secondly, by the abolition of the guardians by the Act of 1929, and the transfer of their duties in Woodstock to the county, and of their duties in Headington partly to the city and partly to the county.

H In principle, I think that, despite this added complication, the same result should follow as in the case of the roads. The Woodstock Union, on behalf of its ratepayers, would have had a claim on the Headington Union by reason of the transfer of the beneficial area (No. 2 on the map). The discharge of the duties of the guardians in the Woodstock Union and of those in the Headington Union outside the city has been transferred to the county council, and those of the Headington Union within the enlarged city (including the No. 2 area) to the city council. Subject to the qualification I have made as to the roads, I think that the county council can claim on the city council in respect of the added burden on county ratepayers resulting from the loss of the beneficial area No. 2. Therefore, I think that the arbitrator should make provision under his alternative C, subject to the qualification that the increase of burden on the county ratepayers that he allows for must be limited, in the way I have tried to indicate, only to the increase caused by the Act of 1928, which I think will approximate to the result as under his alternative D. I think that the city should pay the costs here and in the Divisional Court.

Bennett, J.: I would dismiss this appeal, and affirm the order of the Divisional Court. In the end, the answers to the questions propounded by the arbitrator in the special case turn entirely, I think, upon the meaning and effect of the Local Government (Adjustments) Act, 1913, s. 1, and the rules in Part II of the schedule to that Act, and upon whether those statutory provisions are capable, upon their fair construction, of being applied to the facts out of which the claimants' claim arises.

To maintain their contentions that the questions formulated in sub-paras. A and C of para. 2 of the special case should both be answered in the affirmative, the claimants must, I think, establish the proposition that the increase in burden on their ratepayers in respect of which they claim compensation from the respondents is a consequence of the alteration of the boundaries of the city of Oxford by the Oxford Extension Act, 1928 (to which Act I propose hereafter to refer as the Act of 1928). The Act of 1928 severed from the areas in which the claimants, the Headington Rural District Council and the Woodstock Rural District Council, respectively, exercised powers, and discharged duties, parts thereof, and added the severed parts to the city. The severance became effective on Apr. 1, 1929. Thereafter the said three authorities lost their power to levy rates upon the occupiers of the severed parts, and at the same time they ceased to be under obligation to exercise or discharge powers or duties therein.

The severed parts had been profitable to the said three authorities, in the sense that the sums of money which they respectively had obtained in rates from the occupiers of hereditaments therein exceeded the costs they respectively incurred in the execution therein of their powers and duties. The necessary consequence was to add to the burden of the ratepayers in the reduced areas of the said three authorities, respectively, the excess of the sums of money obtained before Apr. 1, 1929, from the ratepayers of the severed parts over the costs incurred by the said three authorities in the execution in such parts of their powers and duties. The Act of 1928 contains two sections in what I understand to be common form, the purpose of which is to enable authorities from whom areas profitable in the sense I have indicated had been severed to obtain compensation from the respondents, to whose area they had been added. These sections are sects. 33 and 61. Sect. 33 (1) applies, *inter alia*, to any case where the extension of the existing city by the Act of 1928 affects any financial relations or questions between the city and the county and enables equitable adjustments to be made. Sect. 33 (2) enables any such adjustment to be made by agreement between the councils of the city and the county, or by an arbitrator. Sect. 33 (3) provides that, in any case in which an agreement for equitable adjustments has not been made, or so far as any such agreement does not extend, the provisions of the Local Government Act, 1888, relating to adjustments between administrative counties and county boroughs shall apply with the necessary modifications. Sect. 61 of the Act of 1928 is as follows :

> Subject to the provisions of this Act, sect. 62 (adjustment of property and liabilities) of the Act of 1888 shall apply to any adjustment which may become necessary in consequence of this Act and for the purposes of such application that section shall have effect (*a*) as if in subsects. (5), (6) and (7) thereof the expression "council" included any authority affected by this Act or by anything done in pursuance of this Act ; and (*b*) as if in the case of any such authority not otherwise empowered to borrow under any Act or on any security or in any manner mentioned in the said subsect. (6) that subsection empowered the authority to borrow under any Act relating to and conferring on the authority a power to borrow on the security of all or any of the funds, rates and revenues of the authority and in the manner provided by the said Act but without the consent of any other authority and subject to the requirement that all money so borrowed shall be repaid within such period as the Minister may sanction : Provided that where the authority affected by this Act or by anything done in pursuance of this Act are the board of guardians of a poor law union, sect. 62 (adjustment of property and liabilities) of the Act of 1888 shall apply with respect to any necessary adjustment with the modifications specified in the first schedule to the Poor Law (Dissolution of School Districts and Adjustments) Act, 1903.

The Local Government Act, 1888, s. 62 (1), (2), provides as follows :

> (1) Any councils and other authorities affected by this Act or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act or such scheme, order, or thing, of the parties to the agreement, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of a terminable annuity for a period not exceeding that allowed by the commissioners under this Act or the local government board.
>
> (2) In default of an agreement as to any matter requiring adjustment for the purpose of this Act, or any matter which, in case of difference, is to be referred to arbitration, then, if no other mode of making such adjustment or determining such difference is provided by this Act, such adjustment or difference may be made or determined by an arbitrator appointed by the parties, or in case of difference as to the appointment, appointed by the local government board.

The remaining subsections are not material for the present purposes. If this had been all the legislation to be considered, it would to-day be clear that neither the county council nor any other local authority who, as a result of an extension of the city boundary, had lost a profitable rating area would be entitled to any compensation from the city who had gained it, for it was decided by the House of Lords in *Caterham Urban District Council* v. *Godstone Rural District Council* (1) that the loss of such an area was not a matter to be adjusted under the Local Government Act, 1888, s. 62, and that that section did not give compensation for any such loss of profit.

This decision was contrary to what was thought to have been the intention of the Local Government Act, 1888, s. 62, and was considered to work harshly against some local authorities when others extended their boundaries, so to put the matter right Parliament passed the Local Government (Adjustments) Act, 1913, the relevant provisions of which have already been read, and therefore I do not propose to read them again.

As appears from the submission to arbitration (a print of which is on p. 15 of the special case), the arbitrator who has stated the special case was appointed, either under sect. 33 or under sect. 61 of the Act of 1928 (it matters not which, and both sections are referred to in the submission), to determine what adjustments have to be made between the claimants and the respondents as a consequence of the extension of the boundaries of the city of Oxford by the Act of 1928. The special case is divided into five paragraphs, and in para. 1, which is divided into nineteen sections, there are stated facts upon which the claimants and respondents are agreed. As appears from para. 1 (16), on Mar. 14, 1934, an agreement was reached between the claimants and the respondents, whereby the respondents agreed to pay the claimants £195,000 in full settlement of all claims, save and except such claims, if any, as the claimants might be entitled to make as from Apr. 1, 1930, in respect of (*a*) the maintenance of roads transferred to the county council from district councils by the Local Government Act, 1929, and (*b*) the administration of public assistance. The arbitration is therefore concerned with those two claims only, and the only foundation for an award against the respondents in respect of them is to be found in the provisions of the Local Government (Adjustments) Act, 1913. It was for this reason that I said at the outset that I thought that to maintain their claims the claimants must establish that there had been an increase of burden upon their ratepayers as a consequence of the extension of the boundaries of the city of Oxford by the Act of 1928, since it is only in such an event that the statute enables an adjustment to be made in respect of such an increase.

I think that the solution of the problem is made easier by considering separately the two claims made by the claimants, taking first their claim in respect of the increased burden upon their ratepayers in meeting the cost of public assistance. When, on Apr. 1, 1929, the Act of 1928 came into operation, neither the claimants nor the respondents were spending any money in connection with public assistance, nor were their ratepayers burdened with any rates in that connection. The powers and duties in regard to that service were executed by the Boards of Guardians of poor law unions, and it was the ratepayers in the areas for which they were responsible who had to bear the cost of executing the powers and duties connected with that service. As appears from para. 1 (2) (*b*) of the special case, parts of three parishes—namely, Cutteslowe, Water Eaton and Wolvercot—were by sect. 5 of the Act of 1928 severed from the Woodstock Union and added to the Headington Union. This transfer did not affect in the least degree the financial relations then existing between the claimants and the respondents, nor did it affect their ratepayers, nor did it add one halfpenny to the burden of rates upon the ratepayers of the claimants. The only authorities affected were the guardians of the poor of the Woodstock Union and the guardians of the poor of the Headington Union. The first-named authority lost, and the second-named authority gained, the power to levy rates for public assistance in the parts of the three named parishes taken from the Woodstock Union and added to the Headington Union, and the parts of the three named parishes were profitable, in the sense I have already indicated, to the Woodstock Union.

The claimants and the respondents, as appears from para. 1 (7) of the special case, have agreed that, as a consequence of the transfer of the parts of those three parishes from the Woodstock Union to the Headington Union, there was an increase of burden upon the ratepayers in the Woodstock Union in meeting the cost incurred by the Woodstock Board of Guardians in exercising their powers and duties as the poor law authority in their reduced area. This fact would have given rise to a claim for adjustment by the Woodstock Board of Guardians against the Headington Board of Guardians under the provisions of sect. 61 of the Act of 1928.

The Local Government Act, 1929, was passed, and came into operation on Apr. 1, 1930. This Act effected radical changes in the machinery for administering the poor law. After Apr. 1, 1930, boards of guardians throughout the country ceased to exist, and their functions were transferred to councils of administrative counties and councils of county boroughs. This change had a double operation in each administrative county and each county borough. It substituted the council of the county and of the county borough as the sole poor law authority in the place of the numerous boards of guardians, and it substituted for the varying rates levied by the boards of guardians to meet the cost of public assistance in their respective unions one uniform rate throughout each county and each county borough to meet the cost of public assistance therein respectively, and payable by the ratepayers of those authorities respectively. The claim made by the claimants in respect of public assistance is formulated in para. 1 (17) (*b*) of the special case, and is in no way related to the claim the Woodstock Board of Guardians had, or might have had, against the Headington Board of Guardians. It is not a claim on behalf, or in right, of the ratepayers in the Woodstock Union, or on behalf, or in right, of the Woodstock Board of Guardians. It is a claim on behalf of the ratepayers throughout the administrative county of Oxford in relief of the burden upon them in respect of the cost of public assistance, not in the old Woodstock Union, but throughout the administrative county of Oxford. It is a claim for an adjustment, not in respect of an increase to a burden resting on Apr. 1, 1930, upon the county ratepayers, but in respect of a new burden placed upon such ratepayers for the first time on Apr. 1, 1930, by the Local Government Act, 1929.

The crux of the matter is whether or not the language of the Local Government (Adjustments) Act, 1913, s. 1, can be fitted to the facts out of which the present claim arises. The language of that section seems to me to envisage, first, a local authority exercising powers and duties in some given area, secondly, a change of boundaries effecting a transfer of a profitable part of the district of that local authority to another, and, lastly, as a consequence, an increased rate being levied upon the ratepayers in the reduced area of that local authority, to enable it to exercise the same powers and duties in the reduced area. The language does not fit the case where, after a change of boundaries has become an accomplished fact, Parliament for the first time lays upon a local authority a new duty, and upon the ratepayers of that authority a new burden to enable the local authority to discharge the new duty. Such a burden is not an increase to an existing burden as a consequence of change of boundaries. So to hold would, as it seems to me, enable adjustments to be made at any time if Parliament established a new public service—for example, hospitals for the sick—and laid the duty of performing it upon county councils and county boroughs, and the burden of paying the cost of it upon the ratepayers of those authorities.

For these reasons, I would myself answer question C in para. 2 of the special case in the negative. The same process of reasoning would lead me to answer question A of the same paragraph in the same sense. The facts that give rise to this question are these. On Apr. 1, 1929, parts of the Headington Rural District Council and of the Woodstock Rural District Council were by the Act of 1928 severed therefrom, and added to and became part of the city and county borough of Oxford. At that date the councils of these two rural districts were road authorities, with powers and duties to exercise in respect of certain roads. As appears from para. 1 (7) of the special case, the claimants and respondents agree that, as a consequence of the severance, an increase of burden was thrown upon the ratepayers of the said rural districts in meeting the cost incurred by the said rural district councils in the execution of their powers and duties as road authorities as a consequence of the alteration of the boundaries of the city of Oxford, a state of facts which can be fitted exactly to the language of the Local Government (Adjustments) Act, 1913, s. 1.

A The councils of the rural districts each had a claim against the respondents for adjustment. The claims were suspended pending a decision in *Godstone Rural District Council* v. *Croydon Corpn.* (2). The decision of the Court of Appeal was given in that case on July 22, 1932. Thereafter, the respondents agreed with the councils of the Headington
B Rural District and of the Woodstock Rural District respectively to pay them compensation for the increased burden upon their ratepayers to meet their costs as road authorities the respective sums of £1,925 and £650. Following the decision of the Court of Appeal in the *Croydon Corpn.* case (2), their claims were restricted to the period which ended on
C Apr. 1, 1930.

By virtue of the provisions of the Local Government Act, 1929, on Apr. 1, 1930, the said rural district councils and all other rural district councils in the administrative county of Oxford ceased to be road authorities, and the roads which theretofore had been maintained by
D rural district councils became maintainable by the claimants. Just as in the case of their claim in respect of public assistance, so in the case of their claim in respect of road maintenance, the claimants' claim, formulated in para. 1 (17) of the special case, has no relation to the claims of the Headington Rural District Council or to those of the Woodstock
E Rural District Council, nor to any increase in burden upon their respective ratepayers. It is a claim for adjustment in respect of a burden, cast for the first time after Apr. 1, 1929, upon a body of ratepayers who bore none of it until Apr. 1, 1930, made by an authority who exercised no powers or duties upon the roads in question until the same date. We
F are not concerned in the present case to consider whether the decision of the Court of Appeal in the *Croydon Corpn.* case (2) is right or wrong. The only question we have to consider is whether the language of the Local Government (Adjustments) Act, 1913, can be fitted to the facts out of which the present claims arise. For the reasons I have already
G given, I do not see how it can. Accordingly, I would answer the questions in para. 2 (*a*) of the special case in the same sense as the Divisional Court did.

The alternative questions propounded in para. 2 (*b*), (*d*), seem to me to be based upon the idea of subrogating the claimants to the rights the
H Headington and Woodstock Rural District Councils might have had against the respondents, and to the right the Woodstock Guardians might have had against the Headington Guardians if the Local Government Act, 1929, had not been passed. I can find nowhere in any statute a foundation for an award in favour of the claimants upon such an

argument, and the right must be based on statute. Accordingly, I would answer these questions in the negative.

Appeal allowed with costs in both courts.

Solicitors: *Cunliffe & Airy*, agents for *F. G. Scott*, Clerk to the Oxfordshire County Council (for the appellants); *Sharpe, Pritchard & Co.*, agents for *A. Holt*, Town Clerk, Oxford (for the respondents). A

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